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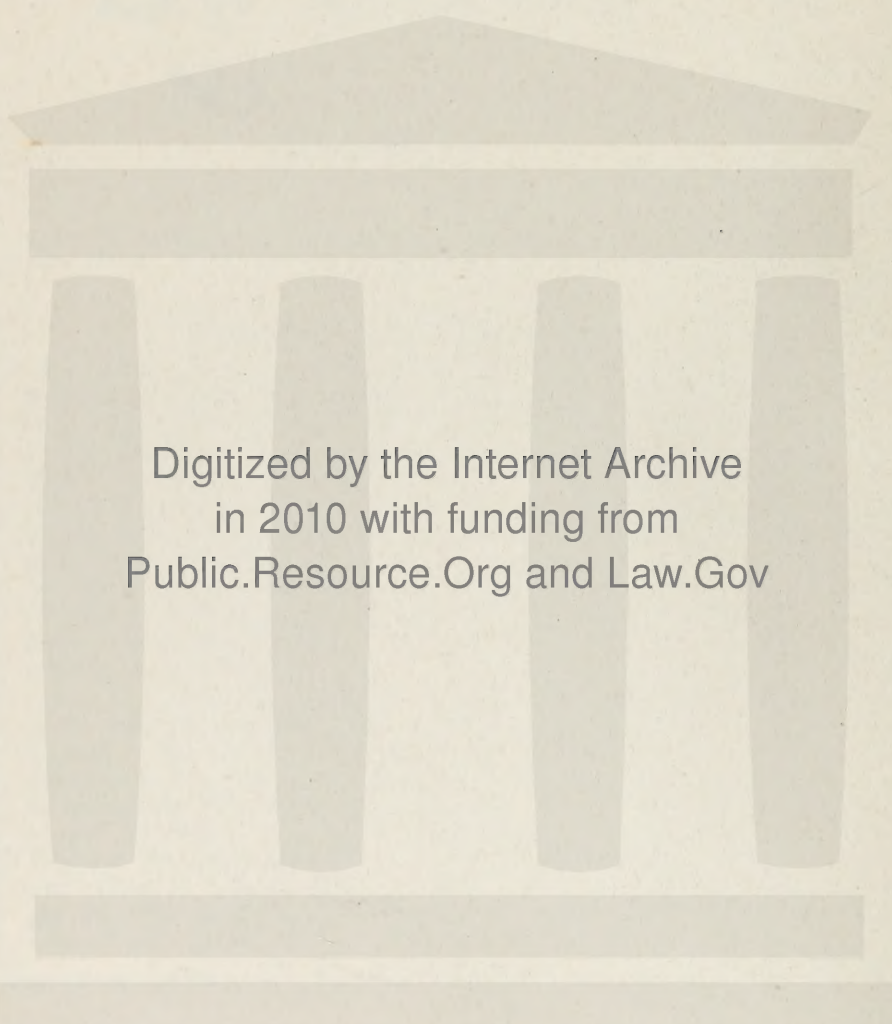
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No. 2698

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

APOSTLES ON APPEAL

GUST FONDAHN,

Appellant,

vs.

SCHOONER "C. S. HOLMES," her
tackle, apparel, furniture, etc.

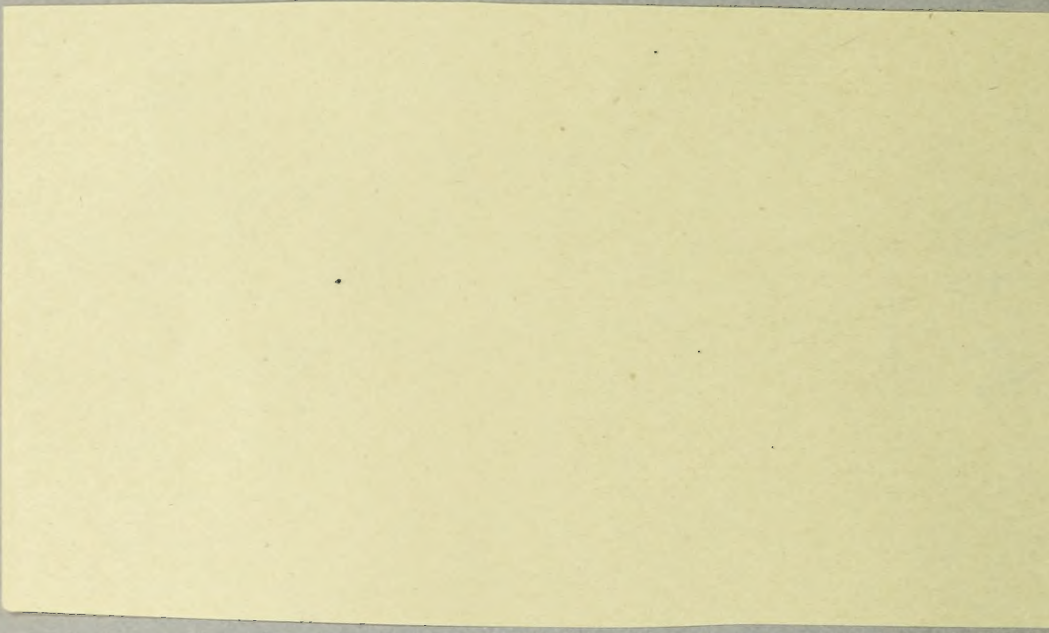
Appellee.

TRANSCRIPT OF RECORD

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Filed

DEC 6 - 1915



No.

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FOR THE NINTH CIRCUIT

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GUST FONDAHN,

Appellant,

vs.

SCHOONER "C. S. HOLMES," her
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Appellee.

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

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*In the District Court of the United States for the Western
District of Washington, Northern Division.*

GUST FONDAHN,	} No. 2539
<i>vs.</i>	
SCHOONER "C. S. HOLMES," Etc.,	
<i>Respondent.</i>	

NAMES AND ADDRESSES OF COUNSEL.

DANIEL LANDON, Esq., Attorney for Libelant and Appellant, 1054-5-6 Empire Building, Seattle, Washington.

RICHARD A. BALLINGER, Esq., Attorney for Respondent and Appellee, 901 Alaska Building, Seattle, Washington.

ALFRED BATTLE, Esq., Attorney for Respondent and Appellee, 901 Alaska Building, Seattle, Washington.

R. A. HULBERT, Esq., Attorney for Respondent and Appellee, 901 Alaska Building, Seattle, Washington.

BRUCE C. SHORTS, Esq., Attorney for Respondent and Appellee, 901 Alaska Building, Seattle, Washington.

*In the District Court of the United States for the Western
District of Washington. Northern Division.*

GUST FONDAHN,	} No. 2539.
vs.	
SCHOONER "C. S. HOLMES," her tackle, apparel, furniture, etc.	
	<i>Respondent.</i>

STATEMENT.

TIME OF COMMENCEMENT OF SUIT.

August 29, 1913.

NAMES OF PARTIES.

Gust Fondahn, Libelant.

Schooner "C. S. Holmes," etc., Respondent.

DATES WHEN PLEADINGS WERE FILED.

Libel: August 29, 1913.

Amended Libel: January 12, 1914.

Answer: April 2, 1915.

ISSUANCE OF PROCESS AND SERVICE THEREOF.

The libel herein was filed in the above-entitled Court on August 29, 1913. Process was issued on that day and delivered to the United States Marshal, for the seizure of the said Schooner "C. S. Holmes." Bond for Release was filed and approved September 6, 1913, said Schooner being bound unto the United States Marshal in the sum of seven thousand dollars, with National Surety Co., a corporation, as surety.

REFERENCE TO COMMISSIONER.

On October 23, 1913, it was stipulated that testimony might be taken at this time by either party as though the cause had been referred after issue joined. On June 15, 1915, said Commissioner duly returned the testimony taken before him in said cause into Court and the same was on said day filed in the office of the Clerk thereof. On August 4, 1915, an Order was signed by the Court permitting further testimony to be taken, and on September 2, 1915, said Commissioner duly returned the supplemental testimony taken before him in said cause into Court, and the same was on said day filed in the office of the Clerk thereof.

The cause was submitted to the Court on documentary evidence.

FINAL DECREE.

Final Decree, in accordance with opinion of the Court, was filed October 4, 1915, which decree was signed by Honorable Jeremiah Neterer.

NOTICE OF APPEAL.

Notice of Appeal, with admission of service thereof, filed October 4, 1915.

Citation filed October 18, 1915.

*In the District Court of the United States for the Western
District of Washington, Northern Division.
In Admiralty.*

GUST FONDAHN,

Libelant,

vs.

SCHOONER "C. S. HOLMES," her
tackle, apparel, furniture, etc

Respondent.

No. 2539

AMENDED LIBEL.

TO THE HONORABLE JUDGES OF THE ABOVE
ENTITLED COURT:

The amended libel of Gust Fondahn, of Port Townsend, Washington, late seaman of the American schooner C. S. Holmes, whereof Harry Thompson now is or late was master, against the said ship, her tackle, engines, apparel and furniture, and against all persons lawfully intervening for their interest therein, in a cause for damages for personal injuries and wages, civil and maritime, sheweth:

I.

That during the month of December, 1912, the Libelant signed articles as an able seaman to make a trip on board the Schooner C. S. Holmes from San Francisco, California, to Everett, Washington, and return at forty-five dollars per month.

II.

That while on the return voyage and while performing his duty as a seaman, on the Third of January, 1913, in the afternoon a heavy storm arose and the ship sought

shelter in Neah Bay. A tug was sent out to look at the condition of the weather, and came back and reported that it was not fit for any vessel to go out on account of the mountain of sea running at twelve o'clock noon. With the weather conditions unchanged the Steamer Goliath gave the said "C. S. Holmes" a steel cable of five inches thickness which was taken on board and made fast on the forward end of the said ship by being placed three times around a square bit; and by order of the captain of the said ship "C. S. Holmes," the steamer Goliath towed her to sea, it taking the steamer seven hours to tow the "C. S. Holmes" a distance of eight miles.

III.

That at about seven o'clock and while weather conditions were unchanged the said steamer blew her whistle to let go the wire; the captain of the "Holmes" gave general orders for everybody to go forward and take hold of the wire, the crew held back; when they received the orders the second time everybody went forward, but none went to the wire except the libelant; the captain was standing about four feet above the libelant where he could see everything goin on; libelant being in a position where he could not see the condition of the wire, libelant inquired of the captain how the wire was on the bow, and he was told by the captain that the wire was slack and that everything was all right and to let go, and libelant let go the lashings and went away as quickly as possible to avoid danger. The wire was tight

and sprang back and hit libelant, causing a compound fracture of libelant's right arm, paralyzing and bruising his side.

IV.

That the captain gave orders to go back to Port Angeles, libelant requested to be taken to Port Townsend but was informed that it would cost \$100 to do, and that there was a marine doctor at Port Angeles and so refused; they arrived at Port Angeles at three o'clock in the morning; the libelant again requested to be taken to Port Townsend to the marine hospital and the captain again refused; at about seven or eight o'clock the captain took libelant to Dr. Taylor, wrote out a permit, gave it to the said doctor, informing him at the same time that it was good for all expenses incurred; the said doctor asked the captain to explain the permit, the captain then told him, "I have nothing to explain, the man is in your care now and he is out of my hands," at the same time laughing at the doctor in a manner that would indicate that he had knowingly deceived him. The captain knew all the time that there was no marine doctor at Port Angeles, and that the permit was valueless for any purpose other than to be used for admission at the Port Townsend Marine Hospital. The captain deliberately put libelant off at Port Angeles for the purpose of getting rid of him, knowing and intending that he would at most only receive temporary relief; at the same time he knew, or should have known, that libelant needed

prompt and permanent attention on account of the condition of his injuries.

V.

That the libelant was taken to the office of the doctor and in the presence of the captain an attempt was made by the then unwilling doctor to fix him up temporarily, which was not successful, and two days later while libelant was still in a helpless condition the doctor requested the libelant to leave. Libelant was unable to move; he received no more attention or treatment for six days longer, when with considerable of effort he made his way to Port Townsend. During the time he was at Port Angeles blood poison set in, and after two months' treatment at the marine hospital at Port Townsend an attempt was made to set the bones, but the ends of the bones so broken had commenced to decay by reason of treatment being neglected when injured, and the arm was in such condition that the plates used to hold the bones together broke loose and the bones are still continuing to decay.

VI.

That by reason of the treatment being delayed as aforesaid the bones will never knit together but will continue to be a source of great annoyance, pain and suffering to the libelant; that during all the times herein mentioned the libelant has suffered excruciating pain, humiliation and inconvenience, at times despairing of his life.

VII.

That prior to said injuries libelant was an able bodied man of the age of forty-five years, capable of and was earning the sum of forty-five dollars and subsistence; that libelant will be put to great expense in securing medical and surgical treatment during his entire life; that ever since said injuries he has been and now is wholly incapacitated and he believes will ever be so.

VIII.

That libelant has paid the sum of thirty dollars to said doctor at Port Townsend for the service so received.

IX.

That libelant was paid his wages up to the time he was injured; that he is entitled under the circumstances herein set out to one month's pay in addition to said sum.

X.

That by reason of the injuries received as aforesaid the libelant is damaged in the sum of \$4,000.00.

That by reason of the failure of respondent to provide libelant proper medical and surgical treatment he is damaged in the sum of \$10,000.

That libelant is entitled to the return of the \$30 paid by him for medical treatment.

That he is further entitled to \$45 for wages.

XI.

That the vessel was at the time this libel issued

lying at Winslow, in the waters of Puget Sound in Kitsap County, Washington.

XII.

That all and singular the said premises are true and within the admiralty and maritime jurisprudence of the United States and this Honorable Court.

Wherefore, this libelant prays that process issue in due form of law according to the course of this Honorable Court in causes of admiralty and maritime jurisprudence against the said Schooner; that the said ship may be condemned and sold, and that the Court be pleased to grant to this libelant such other and further relief as in law and justice he may be entitled to.

DANIEL LANDON,
Proctor for Libelant.

STATE OF WASHINGTON, {
County of King. } ss.

Gust Fondahn, being first duly sworn, on oath says: That he is the libelant in the above entitled action; that he has read the foregoing libel, knows the contents thereof and believes the same to be true.

GUST FONDAHN.

Subscribed and sworn to before me this 7th day of January, 1914.

(Seal) DANIEL LANDON,
Notary Public in and for the
State of Washington, resid-
ing at Seattle.

Service of the within Amended Libel by delivery of a copy to the undersigned is hereby acknowledged this 9th day of January, 1914.

BALLINGER, BATTLE, HULBERT & SHORTS.

Indorsed: Amended Libel. Filed in the United States District Court, Western District of Washington, Northern Division, January 12, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

*In the District Court of the United States for the Western
District of Washington, Northern Division.
In Admiralty.*

GUST FONDAHN,

Libellant,

vs.

SCHOONER "C. S. HOLMES," her
tackle, apparel, furniture, etc.

Respondent.

No. 2539.

ANSWER.

Comes now George E. Billings, agent for the owners of the schooner "C. S. Holmes," and claimants herein, and for answer to the amended libel herein denies and alleges:

I.

Said claimants admit the allegations contained in paragraph I of said amended libel.

II.

Claimants deny each and every allegation contained in paragraphs II and III of said amended libel, except that it is admitted that the libellant was injured while working on said schooner "C. S. Holmes" as a seaman.

III.

Said claimants deny each and every allegation contained in paragraph IV of said amended libel, except that it is admitted that the captain of said schooner "C. S. Holmes" took libellant to Dr. Taylor, at Port Angeles, for treatment.

IV.

Said claimants deny each and every allegation of paragraph V of said amended libel.

V.

Said claimants deny each and every allegation contained in paragraph VI.

VI.

Said claimants deny any knowledge or information sufficient to form a belief as to the allegations of paragraph VII of said amended libel and therefore deny the same.

VII.

That said claimants deny any knowledge or information sufficient to form a belief as to the allegations contained in paragraph VIII of said amended libel, and therefore deny the same.

VIII.

Claimants deny each and every allegation contained in paragraph IX of said amended libel, except it is admitted that libelant's wages were paid up to the time he was injured.

IX.

Said claimants deny each and every allegation contained in paragraph X of said amended libel, and deny that libelant has been damaged in the sum of four thousand dollars (\$4000) by reason of the injuries received as alleged in said paragraph, or in any other sum what-

soever, and deny that libellant was damaged in the sum of ten thousand dollars (\$10,000) or any other sum whatsoever by reason of the failure or neglect of the said claimants or respondent by reason of the failure to provide libellant with proper medical and surgical treatment, as alleged in said paragraph, or at all.

For a FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE to libellant's second cause of action, claimants allege:

I.

That the condition of libellant's arm, if he has failed to recover from the injuries sustained, has been due to his own fault, carelessness and negligence in failing to follow the directions of the doctors at Port Angeles, in whose care the captain of said schooner left libellant, and in failing to exercise reasonable care and diligence after voluntarily leaving the doctors at Port Angeles, in going immediately to other competent doctors and surgeons, and in failing to follow the directions and treatment prescribed by the doctors at Port Angeles, in whose charge and care libellant was left by the master of said vessel.

Wherefore, respondent and claimants pray that libellant take nothing by reason of his amended libel, and that said action be dismissed.

BALLINGER, BATTLE, HULBERT & SHORTS,
Proctors for Respondent and Claimants.

STATE OF WASHINGTON, }
County of King, } ss.

ROBT. A. HULBERT, being first duly sworn, on oath deposes and says that he is one of the proctors for respondent and claimants in the above entitled action, and makes this verification for the reason that George E. Billings, agent for said respondent and claimants, is a non-resident of the state of Washington; that he has read the foregoing answer to amended libel, knows the contents thereof, and that he believes the same to be true.

ROBT. A. HULBERT.

Subscribed and sworn to before me this 1st day of
April, 1915.

R. G. DENNEY,

Notary Public in and for the State of Washington,
residing at Seattle.

Copy of within answer received and due service thereof acknowledged this 2d day of April, 1915.

D. LANDON.

Indorsed: Answer to Amended Libel. Filed in the United States District Court, Western District of Washington, Northern Division, April 2, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

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*In the District Court of the United States for the Western
District of Washington. Northern Division.*

GUST FONDAHN,	} No. -----
<i>Libelant,</i>	
vs.	
SCHOONER "C. S. HOLMES," her	}
tackle, apparel, furniture, etc.	
<i>Respondent.</i>	

To the Honorable Judges of the Above Entitled Court :

On this 23rd day of October, 1913, the libelant appeared in person and by Mr. Daniel Landon, his proctor; the claimant appeared by Mr. Bruce C. Shorts, one of the proctors for said claimant. Thereupon it was stipulated that testimony may be taken at this time by either party as though the cause had been referred after issue joined. It being understood that neither party waives any right by the taking of this testimony prior to the settlement of the pleadings.

LIBELANT'S TESTIMONY.

GUST FONDAHN, the libelant, being duly sworn, testified in his own behalf as follows:

Q. (MR. LANDON). You are the libelant in this case?

A. I am.

Q. And was on the schooner C. S. Holmes?

A. Yes sir.

Q. Who was Captain at that time?

A. Captain Thompson.

Q. When did you sign on the C. S. Holmes?

A. The beginning of December, as near as I can recollect.

Q. 1912?

A. Yes sir.

Q. Where?

A. San Francisco.

Q. And where were you bound?

A. Going from Everett back to San Francisco.

Q. What happened on or about the 3rd of January, 1913?

A. Well, it was blowing a gale of wind, and we had to go and seek shelter in Neah Bay. And the tug went out to look at the weather in the forenoon, and came back and reported that it was not fit for any vessel or anybody to go out on account of the mountainous sea running. This was 11 o'clock he reported that to our captain. At 12 o'clock we had our dinner, and our anchor cable broke. We lost 15 fathoms of cable on one anchor. We dropped in another anchor and hoisted signals of distress and the steamer Goliath came to our help and gave us a steel cable of five-inch thickness. We got that on board and made fast on the forward end of the ship. We had three turns around a square bitt, about four inches wide. She took us to sea. We expected to find a better shelter, but she took us to sea and it took the steamer seven hours to tow us about eight miles. In ordinary weather she could do the same work in one hour—this was on account of bad weather.

MR. SHORTS: I object, and move that this testimony be stricken on the ground that it is incompetent, irrelevant and immaterial. It does not have anything to do with the issues in the case.

A. (Continuing): At seven o'clock at night the steamer blew the whistle to let go the wire. We got the general order for everybody to go forward and take hold of the wire. They held back for a minute or so and got the order the second time.

Q. By whom?

A. By the captain. Everybody went forward, but nobody went to the wire except myself. I was ahead of the rest, and they stopped about eight feet away from me, in a safe place. I started to let go the lashings from the wire. During that time I expected help, but no help was coming, and the captain failed to send the men there, and I had no time to linger, so I came to the conclusion to let go the wire, and, as I done so, I went away as quick as possible, and the wire sprung back and hit me, which could be prevented if I had had everybody to help me with the wire. During the time I was on board that vessel I let go that wire twenty-four times, and everybody was there every time we let go the wire, as it was necessary. I got my arm broke and my side paralyzed, bruised and stiff, and the captain told——

Q. Before you go into that I would like to ask a few questions. At the time you went to let loose the wire and at the time you did let it loose, did anybody order you to do it?

A. We got orders twice for all hands on board to go and let that go.

Q. Who executed the orders?

A. The captain was on deck. When the captain is not on deck the mate does it. In this case the captain done it.

Q. Where was the captain at the time you let go of the wire?

A. The captain was standing eight feet away from me and talked to me right along. He was standing above me about four feet, so that he could see everything going on. I asked the captain once how the wire was over the bow, and he told me the wire was slack—I could not see, and he said everything was all right to let go.

Q. When was that?

A. It was just before I started to let go the lashings. I would not let go the lashings before I knowed the wire was slack.

Q. Before you let go you said something about not having any time to linger. What did you mean by that?

A. The ship was taking the sea right along. This is the reason the men did not come there, they were afraid to go there. She was taking in water, and if I was going to make fast the lashings again it would take a long time and I would get drowned to stay too long, and I had to let it go and had to run.

Q. Now continue your former answer.

A. The captain gave orders then to go back to Port Angeles. I asked the captain why he wanted to go to

Port Angeles. We had the whole night to go to Port Townsend, and the captain told me we would go into Port Angeles, he says, and you get a doctor there, it will be too much expense, it will cost us about \$100 to go to Port Townsend. I asked the captain if there was a marine doctor in Port Angeles, and he says, yes. He says the captain of the tow boat Prosper told me that there was one. The captain came into Port Angeles at three o'clock in the morning, and he had to wait until daylight before we could get ashore, it was somewhere around seven o'clock. The captain took me up to Dr. Taylor, Taylor brothers, which I found out was no marine doctor. The captain wrote out a hospital permit for me. This permit is only good for me to be accepted in the marine hospital at Port Townsend. The captain says here is a paper, doctor, to send him to the marine hospital at Port Townsend, and all you have to do for him, and that will square all your expenses. After a minute the doctor asked the captain, he says, I want you to explain this piece of paper. The captain told him, I have got nothing to explain, the man is in your care now and he is out of my hands. After that they took me up to the doctor's hospital and I got chloroformed, and they tried to fix my arm temporarily, as far as I knew. I got out of the chloroform and I recollect the captain was there. But I would not be responsible to give evidence as to what happened. Well, two days after I was in bed, I was helpless, could not get up. The doctor came in the morning and piled my clothes there and wanted to know if I could

get up off the bed. I told him, no, doctor, it is impossible, I cannot move. I says, what is the matter, doctor, anything going wrong? He say no, and he went out. And I spoke to his brother the same day in the afternoon and he told me the truth, he says we find out that the captain gave us a false statement about this piece of paper, and we can get no money from the marine hospital, and the sooner you get out of bed it will be cheaper for you. I explained to the doctor that by the marine law I was allowed to get a doctor and hospital and medical attendance. He said I don't know nothing about that, for to clear ourselves we will have to look for the pay from you. Well, I was thinking about my arm. I could not get no more treatment, and I considered it best to get up as quick as possible. I asked the doctor, in case I got well enough to get up, how much the bill would be, and the doctor told me he would make it cheap under the circumstances, we will only charge you thirty dollars. I told the doctor I would put the money up but I would not pay the bill. I got a receipt for the money. On a Saturday, eight days afterwards, the nurse helped me up and get on my legs. I was able to walk around in there, but I could not sit down. I got the hospital, to the marine hospital, and the doctor asked me why I did not come there first. He says your arm is in such shape that I could not do anything with you. My arm was all festered. It took two months and five days before they could set my arm, before my arm was in condition to set. The first week I came to the marine hospital they took

an X-ray picture of my arm, and the fore-bone had overlapped.

MR. SHORTS: I object as not the best evidence.

Q. Did you turn those X-ray pictures over to me?

A. You have them, yes; I turned them over with all my papers.

MR. LANDON: I will produce the pictures later.

Q. You may continue now.

A. The bone was overlapped and the arm contracted and it was about an inch shorter. And on the 8th of March I got operated on and they plated my arm bones together, and the arm was in such shape and so contracted the plate won't stand. The joints of the bone cave in. And the doctors themselves think there is a cave-in in one bone.

MR. SHORTS: I object to any statement as to what the doctors think. The best evidence would be the doctors themselves. I move to strike the statement and object to any further testimony along that line.

Q. What did they do to you?

A. The doctors?

Q. Yes.

A. They operated on me. They put plates in, silver plates. And the arm was contracted in such shape it would not stand it; it broke loose again and caved in.

Q. What did they do then?

A. It has been there ever since. I was in perfect physical health, for the abrasions healed up in eight days; there is nothing against me. I blamed the captain——

Q. You are still in the hospital there?

A. I am still there. From the 10th day of January. I got hurt the 3rd of January.

Q. Can you use your arm at the present time?

A. My arm for labor is permanently useless. I cannot lift nothing with it.

Q. How old are you?

A. Forty-one past, very near forty-two.

Q. What occupation have you been following?

A. Been going to sea all my life.

Q. And what wages were you earning?

A. Forty-five dollars a month.

Q. Including board on the vessel, of course?

A. Yes. I want to add that I wrote twice down to San Francisco.

Q. What correspondence, if any, have you had with the owners of the ship?

A. There was through the Union a man representing me to the owners, Mr. Tennyson representing the ship's owners. The man who was representing me in Port Townsend was Miller. I was helpless, I could not write; as far as that goes I could not write yet.

Q. Did you see the letters?

A. He showed me the letters, and told me that Tennyson was the representative of the ship.

Q. Go ahead.

A. The doctor in Port Angeles he sent a letter to me and told me he wrote to the captain and explained the case to him. I never got the money. But he promised, on

one condition, if I wanted to sign an agreement not to prosecute them and to get two witnesses to sign, and he gave me a typewritten sheet of paper to that effect. That is about all of my statement.

Q. Have you anything further that you want to say about this matter?

A. Yes sir. I believe that the captain for to avoid paying of the doctor bill told the doctor, gave the doctor a false statement.

MR. SHORTS: I object as incompetent, irrelevant and immaterial. I have no objection to his stating any fact, but object to his beliefs.

MR. LANDON: I have no objection to the last statement being stricken.

Cross Examination.

Q. (MR. SHORTS): You say you were struck on

A. Yes sir.

Q. And that was about six o'clock in the afternoon, was it not?

A. It was after supper, somewhere around seven o'clock.

Q. You were about ten miles off Cape Flattery at the time, were you?

A. Eight or ten. Right between Flattery and Cape Beale. It was bad weather. When you are working you cannot judge these things exactly. The biggest tug on the Sound, the Goliah, a 1600 horsepower tug, she could have gone out in one hour, but it was bad weather and we were underneath the water more than on top

of the water. She took fire twice in the afternoon beside this trouble, and our place was to seek shelter and wait another day.

Q. Now, as soon as you were injured, Mr. Fondahn, where did you go; down in the fore-castle?

A. I got knocked down.

Q. But after you got up?

A. I could not get my breath back for quite a while. Then the men came down and asked me how I felt. A certain one says I thought you were killed. I didn't know where you went, I thought you went overboard. I says, no, I am not killed, I landed on my feet, right down below, I don't know how. Things like that go so quick, but I did not lose my senses.

Q. You landed on your feet. Then where did you go?

A. I stood there until the men came around, and the captain came around.

Q. Then what did you do?

A. I went to the fore-castle.

Q. And you got in a berth or a bunk there?

A. This gentleman helped me in the berth. I was helpless.

Q. What did the captain do for you, did he treat your arm?

A. He washed my arm and put a piece of a kind of bandage on it.

Q. He took the best care of you that he could, bandaged you up?

A. Under the circumstances, yes.

Q. Put some splints on your arm and bandaged it?

A. A stick on one side and a piece of paper on the other.

Q. He did the best he could under the circumstances?

A. Well, anybody in the forecastle could have done the same thing.

Q. The captain did all he could to help you, that is they all did, didn't they?

A. Yes.

Q. And then the captain put his ship about to go back into the straits?

A. Yes sir, that is right.

Q. How long was it before you picked up a tow going back in?

A. Well, I could not judge. This Goliah is a big boat and she came out and she went right back into Neah Bay, and she seen our light. She did not know what was coming in. I spoke to a man that belonged to the boat and that is how I know. But anyhow she came out to us. I was down below and all I know is what I heard.

Q. Never mind if you did not see it. I will prove that by somebody else who saw it. Then you got into Port Angeles about six the next morning, was it not?

A. Somewheres around three in the morning. Probably a little after three.

Q. You went ashore from the Holmes in a tug boat?

A. I did.

Q. And as soon as you got ashore, you and the captain walked up to the doctor's office?

A. Yes, we met the doctor on the street, I believe.

Q. What time did you go ashore?

A. We met the doctor on the street just at daylight. I could not tell you exactly the time. I was in pain and everything, and I was thinking more about my arm than the time. We came ashore and I remember it was about daylight at that time of the year was seven o'clock in the morning.

Q. Then after some little time in the doctor's office you went to the hospital at Port Angeles?

A. Yes sir.

Q. And it was at the hospital that you were chloroformed and your arm was set by the doctors there?

A. My arm was not set. The picture shows my arm was not set. He fixed my arm the best he could, I suppose, at the time, temporary.

Q. Now the captain came up to the hospital there in Port Angeles to see you along about noon, didn't he, the same day you went there?

A. There was no clock in the place where I was lying. I was under chloroform and I did not know anything about the time. I know the doctor told me that about ten o'clock I was chloroformed. I was only from under the influence and I could not tell you exactly.

Q. You remember the captain being there?

A. Yes, I remember that.

Q. Now whatever money you had you turned over to the doctor there?

A. I did when I first came in. I gave it to the nurse before I was chloroformed. I had no other place to put it.

Q. What date did you leave the hospital at Port Angeles?

A. The following Saturday morning, that was eight days.

Q. You were at the hospital in Port Angeles eight days?

A. Yes sir.

Q. During that eight days the doctors treated you and the nurse attended you there, did they?

A. Yes, that is what I was in the hospital for.

Q. Then after you left the hospital you took a boat and went over to Port Townsend?

A. I did. I had to stand on my feet right along. I could not sit down. If I sat down I could not get up again. My legs were all right.

Q. What time in the day did you leave Port Angeles to take the boat for Port Townsend?

A. About half past one at noon.

Q. As soon as you got to Port Townsend what did you do, walk to the marine hospital?

A. Yes.

Q. Did you have with you the permit that the captain had made out?

A. Yes. You cannot get in the hospital without. That is the only thing it is good for.

Q. And where did you get the permit?

A. The doctor had to give it to me.

Q. The doctor in the hospital at Port Angeles gave you the permit that the captain had made out and given to him?

A. Yes.

Q. That permit was accepted at Port Townsend all right? at the Marine Hospital there?

A. That is the only thing it is good for.

Q. You have been taking treatment at the Marine Hospital at Port Townsend ever since?

A. Ever since, yes. I am under the hospital care now and will be for I do not know how long.

Q. Now the only money that you ever paid out for medical treatment or care or hospital expense was the thirty dollars that you paid the doctor at Port Angeles?

A. Yes, and the matter of a dollar down to Port Townsend.

Q. The dollar fare going from Port Angeles to Port Townsend?

A. Yes, and I think by law I am entitled to a month's pay beside.

Q. You were paid your wages, were you, on the voyage?

A. Yes, up to the time of the accident.

Re-Direct Examination

Q. (Mr. Landon). Did you have an X-ray picture taken of your arm?

A. Where?

Q. At Port Townsend.

A. No, not at Port Townsend, but at Fort Worden, the military reservation out there. They have no X-ray machine in the hospital.

Q. When was this taken?

A. This was taken seven weeks afterwards. This other one was taken the first week I was in Port Townsend.

Q. This one was taken the first week you came there?

A. Yes. During the first days I was there.

Q. I show you this picture which has been marked "A" for identification, and ask you what that shows?

A. This is the state of my arm when I came to the Marine Hospital at Port Townsend.

Q. Now this picture, marked "B" for identification, state what that shows?

A. That is a picture of my arm after seven weeks, after the operation.

Q. That was after the operation?

A. Seven weeks after the operation at Port Townsend.

Q. It has not been operated on since that time?

A. No, they cannot do it yet. There is motion in the joints, but they won't do anything before they get connections stronger; sometimes it takes a long time.

Q. Where was this taken?

A. Same place, Fort Worden.

Q. Did you go out there to have this taken?

A. Yes.

Q. I show you this paper that has been marked "C" for identification, and ask you what that is?

A. That is a paper I got sent from the Billings office.

Q. You never signed that?

A. No, I did not sign that. That paper explains itself.

(Witness excused from the stand.)

Recess taken.

Seattle, Wn., October 28, 1913.

PRESENT:

Mr. Landon, for the Libelant.

Mr. Shorts, for the Claimant.

LUDWIG HULST, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. Landon). Where do you reside?

A. I live over on Seneca street, No. 84.

Q. What is your business?

A. I am a sailor.

Q. Were you on board as one of the seamen on the C. S. Holmes when Gust Fondahn got injured?

A. Yes, sir.

Q. Just go ahead and tell what took place?

A. Shall I start when we left Neah Bay? When we came into Neah Bay we went in there for bad weather;

about noon time we lost an anchor and we got out the other anchor, and got the flag up for the steamboat, and a steamboat came alongside and put a big cable on board and took us to sea. Then, when we got out to sea, it started to get dark. At last the whistle blowed to let go the cable, and the captain called us all aft, and then he told us to let go the cable. And when we came up there he went down there to take off the lashings, we were all standing there, we were kind of scared to go down; there was a high sea and the water was coming over all the time, and he cut the lashings and he could not do nothing else, and he jumped away but did not get far enough away and the cable threw around and knocked him down and he got his arm broke. We went down and helped him into the forecastle where we lived, and started to wash his arm. The captain went to the deck and put the boat about, put the vessel around again to go in.

Q. Go ahead and tell what happened then?

A. When the captain went around, he came down again, and Gust says where are you going, captain? And the captain says I guess I will go to Port Angeles, there is a doctor there. Gust says, why don't you go and take me right up to Port Townsend, so that I could get in the hospital and everything would be clear. After while the captain says, I don't want to go up there, it would cost me a hundred dollars more. Of course he didn't say nothing more then, he was almost all in, and I was washing his arm and everything. And I asked

the captain for something to bandage to put around his arm and the captain didn't have none, so Gust he had some small clothes in a kind of sewing bag and I got hold of that and I put that around his arm. And I put some papers on and the bandage around. And we went in to Neah Bay. And the big tug that took us out came out and asked our captain what was the matter. And the captain says we got a man badly hurt. He says where do you go to now? And the captain says I want to go to Port Angeles. Well, he says I can take you up there if you want. No, says the captain, you are too big for us; I don't want you, but you can have the Prosper come and let her take us up, she is a smaller boat, she is not got so big a cable, and the Prosper came out and told our captain to lower down the sail and asked us if he wanted to go to Angeles, and he says, yes, I want to go to Angeles; there is a doctor there? And the captain of the Prosper said, yes, there is a doctor there in Angeles. Well, we came up. I could not say exactly the time, but I suppose it was a little before three or a little after three in the morning when we came to Port Angeles. We just lowered down the sail and we all went in to bed to sleep until daylight. As soon as daylight we got up and had breakfast and the tug boat came alongside, and they took Gust on shore, and what happened after he got ashore I do not know.

Q. Now, did you ever have any conversation with the captain of the C. S. Holmes?

A. I had when we came out to sea again.

Q. What was that conversation?

A. I asked him how Gust was getting along, and the captain says, he is all right, the doctor told me there was just a clean break, just broke clean off and it would be all right pretty soon. That is what he told me and I said to him one day that doctor in Port Angeles is not a marine doctor. Well, the captain says, I don't think he is, but he is just as well off there as he would be anywhere else. But the captain knowed there was no marine doctor there, and knew that before we went in.

Cross-Examination.

Q. (Mr. Shorts.) When you were sailing back up the straits after the accident, and the big tug first came out, did you hear your captain say anything to the captain of the big tug?

A. That spoke to him?

Q. Yes.

A. Yes, I was standing at the wheel right alongside, about five or six feet between me and the captain.

Q. Did you hear your captain call to the captain of the Goliah and ask him if there was a marine doctor at Port Angeles?

A. No, he did not ask for any marine doctor. He says there is a doctor up in Port Angeles, that is the captain from the tug says there is a doctor up there.

Q. And when the tug Prosper came out later on, did you hear your captain call out to the captain of the Prosper and ask if there was a marine doctor at Port Angeles?

A. No, sir.

Q. You did not go ashore with the captain at Port Angeles?

A. No.

Q. When did you leave the schooner Holmes?

A. Left the 17th of February this year.

Q. Did you make another voyage on her after the one Fondahn was hurt?

A. I made one voyage afterwards.

Q. One more voyage?

A. Yes, sir.

Q. What vessels have you been on since?

A. Oh, I have been on the steam schooner Fairhaven and the steam schooner Centralia, and I have been on the barkentine John Smith.

Q. Well, how long had you been on the Holmes before Fondahn was hurt?

A. I came aboard the Holmes about the 20th of October, some time like that, I could not say exactly.

Q. How long have you known Fondahn?

A. Just when I came aboard the Holmes.

Q. Have you seen him since?

A. Not since the other day up there.

Q. Did you see him after the accident very shortly?

A. Right after he got hurt, yes. I helped get him in his bunk and washed his arm and helped about the bandage.

Q. After he was hurt you went down to the fore-castle and the captain washed his arm and dressed it up the best he could, didn't he?

A. Well, all we had there, yes, he did, but we did not have nothing to fasten up the arm with when it comes to that.

Q. Well, the captain put some splints on and banded it up and washed it?

A. Yes, he put some newspapers, yes, he put splints on, too.

Q. You knew as soon as the captain put his ship about after the accident that he was going back to port to get a doctor to attend to Fondahn?

A. Yes, I knowed that. Well, the captain told me that before he went on deck, he said to the crew, you look after Gust for a few minutes, I have to go up and get the vessel around. I was on deck before, I had to go to the wheel after Gust got hurt, I was just helping out there about half an hour and then I had to go to the wheel.

Q. How long have you been going to sea?

A. I have been going to sea fifteen years, close to it.

Q. You have been out to sea in weather that was a good deal rougher than it was at this time?

A. Yes, I have been at sea, out in the open sea, but I have not been sailing out when it was as rough as that now, close to shore, it is a little worse than anything else when a vessel is not quite under sail.

Q. There are marine doctors, no doubt, in many of the ports on Puget Sound and on the coast where there are no marine hospitals?

A. There is not so very many marine doctors on the Sound. There is only just a few doctors.

Q. There is a marine doctor at Seattle.

A. Yes, there is a marine doctor at Seattle.

Q. Tacoma?

A. Tacoma.

Q. Bellingham?

A. No, there is no marine doctor in Bellingham—I don't know. I know there are some places with no marine doctor. Now in Port Angeles that is a small place and there are hardly any vessels come in there.

Q. Have you ever been sent to a marine doctor for treatment?

A. Yes, I have been.

Q. Where?

A. Honolulu.

Q. Ever on this coast?

A. No, not up here.

Q. Now this tug Prosper that took you up and towed you to Port Angeles, was not a very large tug, was she?

A. No, she is one of the smallest on the sound that does towing of vessels.

Q. And if a blow were to come up between Port Angeles and Port Townsend, it might have taken you six or eight hours to go from Port Angeles to Port Townsend?

A. It might have taken us six hours if it blowed heavy, but it has to blow heavy.

Q. It was pretty squally weather at that time?

A. No, it was not.

Q. But squalls do come up there?

A. The squalls the day before, but it was nice and clear and starlight all over when we came up.

Q. There was a pretty heavy sea running when you were towing back?

A. No, there was no sea coming up to Port Angeles, and we had the sea along with us.

Q. But these squalls or blows come up in a very short time, they may blow up any hour?

A. Yes, they might, and blow pretty heavy, too.

Q. So the captain did not have any way of knowing but what a blow would come up any time and delay his getting to Port Townsend?

A. Oh, yes, it might have done that.

Q. Now, in a heavy blow, this Prosper would not have been able to make more than three or four miles an hour; that is, in a heavy blow?

A. No.

Re-Direct Examination.

Q. (Mr. Landon.) There having been a heavy sea a few hours before, was it liable that there should be another one soon?

A. No. When we turned around and we got in, we had the sea right behind us and it shoved us right along.

Q. In your experience there is practically no danger at all of there being a heavy sea between Port Angeles and Port Townsend?

MR. SHORTS: I object as leading.

A. No, not so far as I can say. But there are things that come up that I cannot say, that is more than I know.

Q. (Mr. Shorts). It might have blown up there within an hour and gotten very rough?

A. It did not look like it.

Q. I say it might have?

A. It might have done so probably.

(Testimony of witness closed.)

Hearing adjourned.

Seattle, Washington, October 23, 1913.

PRESENT:

Mr. Landon, for the Libelant.

Mr. Shorts, for the Claimant.

GUST FONDAHN, recalled, testified in rebuttal as follows:

Libelant's Rebuttal.

Q. (Mr. Landon.) You have heard the captain's testimony as to what took place at the doctor's office?

A. Yes, sir.

Q. What did take place there?

A. Dr. Taylor in the office was asked if he was a marine doctor and he said he was not. That is what he said, but he says I do work for the government boat Snohomish, but I am no marine doctor, that is the word he says. It was a small office, and the captain was standing alongside of him and the doctor and me together, the three of us. Another thing, I asked the

captain out at sea to take me to Port Townsend, it was at sea, not Port Angeles. I have a witness in the room to testify that, he heard the conversation.

Q. What was the captain's actions at the time he told the doctor in Port Angeles that he was off his hands—that you were off his hands and on to his?

A. The doctor took the permit and went up to the captain to read it in front of his face. He says, explain this piece of paper, that is the words the doctor said, and the captain says I cannot explain any more than the man is in your hands and is out of my hands, and the doctor took it for granted. The doctor has a witness to that.

Q. How did the captain act?

A. Well, he smiled; that is all he did.

(Witness excused from the stand.)

Seattle, Washington, March 30, 1915.

PRESENT:

Mr. Landon, for the Libelant.

Mr. Hulbert, for the Claimant.

DR. P. I. CARTER, a witness called on behalf of libelant,
being duly sworn, testified as follows:

Q. (Mr. Landon.) Where do you reside?

A. Port Townsend, Washington.

Q. What is your connection with the marine hospital down there?

A. I am one of the surgeons in the Marine Hos-

pital service and am at the Marine Hospital at Port Townsend.

Q. How long have you been there?

A. At the Marine Hospital proper, offhand, about two years and a half, maybe three years; I am not sure.

Q. What did you do prior to that time?

A. I had other details there; a good deal of immigration service there, and then I was at the quarantine station, but that is the same service.

Q. In all, how long have you been in that service of the government?

A. In that service since 1907, in the fall, November.

Q. You are a practicing physician and surgeon, are you?

A. Yes; I also practice on the outside.

Q. What school?

A. I am from the Columbia University, Washington, D. C.

Q. Do you know Gust Fondahn, the libelant in this case?

A. Yes, sir, I do.

Q. When did you first become acquainted with his case?

A. I will have to refer to the hospital data. I cannot remember all the cases in the hospital. I saw him on the evening of January 11, 1913, the first time.

Q. About what time was this in the evening?

A. Late in the evening; I do not remember just the time; it was a late boat.

Q. January 11, 1913?

A. Yes, sir.

Q. You may go ahead and state what condition he was in at the time?

MR. HULBERT: Are you testifying from your memory?

A. I am testifying partly from memory and partly from the records of the hospital.

Q. You hold in your hands memoranda?

A. I have the hospital records.

Q. Who made the record?

A. I did in my own writing.

Q. And you are refreshing your memory from that?

A. Yes; we have so many cases there we have to.

Q. (Mr. Landon.) Go ahead.

A. The whole arm to the shoulder was badly swollen and painful. There was a two-inch sloughing, an infected point over the region of the fracture, that is the fracture of the forearm, both bones were out of position. They were very painful on manipulation or handling. That is the concise way of putting it. He also had injuries to his side and shoulder.

Q. What, if anything, did you find had been done? Was there anything on the arm or had there been?

A. He had an anterior and posterior splint completely over the arm.

Q. Did you treat him there under your control or supervision?

A. Yes, I did.

Q. Go ahead and relate what you did.

A. Well, the first thing was to remove the splints, of course, and examine the wound. I found it sloughing and infected around over the fractured area, the two bones, and it led down to the bone; a great deal of pus there. So I cleaned out the wound as good as we could, and applied a light splint to the arm, leaving an opening over the wound, which allowed us to dress the wound every day. I kept this up for some time. The records will show, I do not remember. And then, as soon as the wound was completely—before that we had a consultation as to the advisability of the form of treatment, what to do; and was advised to wait, on account of the infection until the wound had cleaned up entirely and had healed, which we did. Later on operated and plates were applied, regular surgical operation, but we found so much destruction to the periostium, the covering of the bone, the life of the bone, present, and also deterioration of the muscles, the bone having come through and broken the muscles; but the lack of this periostium caused the bones not to heal. In eight or nine days the external wound healed perfectly—from the operating wound. Afterwards, after quite a while, I do not remember how much time, the bones began to turn a little bit, showing that there was not life enough in the ends of the bone.

Q. I show you libelant's exhibit "A," for identification, and ask you if you have ever seen that before?

A. I have seen that picture—it looks to me like some

picture taken at Fort Worden; I have a duplicate of it in my pocket.

Q. Who sat for this picture?

A. Gust Fonadhn.

Q. When, about?

A. That was January 14th, at Fort Worden; 1913.

Q. What was the occasion of taking an X-ray picture? Was it taken at your direction?

A. Yes; our own X-ray was out of order.

Q. Who wished it taken?

A. I wished to see the condition of the bone, so as to know what to do.

Q. Will you detail the condition of the bone at the time?

A. I did before, in answer to your questions.

Q. After that picture was taken, what did you do?

A. Well, we had to wait until, as I say, we had a consultation of the doctors, and we waited, and decided to wait until the wound had cleaned up, until we saw it was free from infection and healed over; after which we operated and the plates were applied.

Q. You put plates in there?

A. Yes, two plates.

Q. Do you know about this picture, identification "B"?

A. I know that looks very much like it, evidently the picture of the arm at that time, though I do not remember seeing that before.

Q. You applied plates similar to those shown in exhibit "B"?

A. Yes, sir.

Q. What has been the result; what is the present condition, if you know, of his arm?

A. The present condition of the arm, as far as you can find—there is no union between the bone; there may be a little fibrous union between one of them, is all.

Q. I will ask you if there is likely to be any union?

Q. He will always have a poor arm as the result of it.

Q. Would he, in your opinion, be able to follow, for instance, longshoring or any work like that, or as seaman as he was?

A. I don't think so—no, sir, he would not.

Q. Doctor, you examined, or know the condition of his arm, some eight days or so after the examination—or nine days?

A. After which examination?

Q. After the injury?

A. The history gives the injury—

MR. HULBERT: I object—

A. (Continuing.) I will tell you. I saw him the first time on the night of the 11th of January. I have to refer to my data—it was at night.

Q. A man having such a wound as he had, what would you do, or what in your opinion would be the proper thing to do?

MR. HULBERT: I object to that as being incompetent and immaterial to the issues in this case.

Q. At the time of the injury?

A. I would have to judge it from the condition as it was when I found it and his admission of the history.

MR. HULBERT: I object to that further, on the ground that it is not shown that he was present and knew about the condition at the time of the injury or immediately thereafter; he is not competent to testify.

Q. You may answer, doctor.

A. Why, a compound fracture, both bones of the fore arm that could be several hours after the accident. Come down to several hours after the accident, as this case is supposed to have had, would be treated by the open method. That is to say a splint would have been applied, an extension on to the arm, as much as possible. First, if there was very much tenderness and pain, probably wait, just dress the wound and keep it clean and wait for about 48 hours, or until the swelling subsided enough so that you could use an extension, and apply splints of some sort of cast that would give you an extension on the forearm and hold the bones in an apparent right position, at the same time cutting an opening over the wound, to allow the wound to be cleaned and dressed every day without disturbing the splints on that daily dressing. You keep that up and then have an X-ray to be sure you had the bone in place. But you always have the window over the bone so that you could clean and keep clean. Dress it daily. That would be proper treatment, in

my opinion, up to the time the whole thing would heal over, the wound; and then you would keep the window closed and let it go until there should be union of the bones.

Q. I do not know whether you have explained sufficiently what you mean by casting?

A. Well, a plaster cast, splints of plaster paris, so that you would get an extension of the arm, on to the full fore arm, so that you would have the full extension back against the arme here (indicating just above the elbow) and out here, so that it would hold it out that way. (Showing.)

Q. Draw the bones—

A. Extend it so that the two bones would fairly approximate.

Q. Going back to the time that he arrived at Port Townsend, was his arm, or was it not, infected?

A. Yes, there was a good deal of infection, pus.

Q. Swollen?

A. Yes, the whole arm was still swollen, and we found that the wound was very much swollen.

Q. And the infection—what signs were pronounced, if any, of the infection?

A. Well, just the wound, just the sore, the pus coming out of it, and ragged edges of the tissue torn, that is all.

Cross-Examination.

Q. (Mr. Hulbert.) Doctor, you are stationed with the government at Port Townsend?

A. Yes, sir.

Q. There in the general Marine Service, for the government?

A. Yes.

Q. You are what we call a marine doctor?

A. Yes, though I do outside practice, too.

Q. Yes, I understand. Now, there are marine doctors stationed at various places, different ports over the country?

A. Yes, sir.

Q. Do you know anything about how many different places they have marine doctors here?

A. That would be a hard question—all the larger ports.

Q. All over the Sound. For instance, they have one here, one at Tacoma—

A. One at Tacoma; they have one at Bellingham.

Q. One at Everett?

A. I am not sure at Everett.

Q. But scattered around different places, so that when a man is injured aboard a ship, they can drop him off at a marine doctor some place where he can be cared for?

A. Yes.

Q. Now, you found, you say, when this libelant came to you, that he had splints on his arm. What kind of splints were they? Were they plaster of paris splints or wooden splints?

A. If I am not mistaken it was just anterior and posterior wooden or felt splints.

Q. Such as is commonly used?

A. For fractures of different kinds.

Q. And these splints were about such as you have stated that the arm should be put up in the first place?

A. I did not say what kind. But from the history of the case I think I would probably have had to wait for a given time for the swelling to subside.

Q. Before you put on any splints?

A. Then I would put on one that would give him extension and left the window open so that I could dress the wound.

Q. Of course the opinions of doctors differ somewhat?

A. Yes; they always do.

Q. What I want here, is not so much the opinion of one man, but what would be recognized possibly. In your profession you are an old school doctor, are you?

A. The regular school.

Q. I call the regular the old school.

A. Yes, sir.

Q. And this is true, is it not, that in a compound fracture such as this was, undoubtedly there is a great danger of infection?

A. In all open injuries there is a chance for infection.

Q. Would it not be especially true where there is a sailor working on board ship in his ordinary working clothes, and receives a compound fracture, where the bone breaks through the outer skin, naturally carrying

along with it the perspiration and other matter from his clothing, etc. Is not that true, and where it would take several hours to get him to a doctor, would not that be a case where there was exceptional danger of infection?

A. As I said, there is always a big chance for infection wherever there has been a wound.

Q. And the danger under these circumstances is great, and the doctor could do his best and do everything that he could do, according to his learning and teaching and training, and still infection might develop?

A. We have infection sometimes even in the operating room, where there is all precaution taken.

Q. There would be more danger, however, in a case of this kind, than where you have gone to the operating room and taken all the precautions?

A. That stands to reason.

Q. And this was a compound fracture, was it not, doctor?

A. Yes, a very bad one.

Q. Very bad compound fracture. Where both of the bones of the forearm were broken?

A. Yes.

Q. And punches through the muscles and soft tissue, clear out through the skin?

A. Well, apparently they were pressed out, the wound opening and leading down to the bone. That had been a bad fracture of both bones.

Q. And the wound was infected?

A. When I saw it, yes.

Q. You do not know how long it had been infected?

A. I could not tell only from the history of the case.

Q. Under these circumstances and the circumstances of this wound, or this injury, so far as you were able to determine, that the proper thing to do in the first instance would have been to put on splints?

A. In the first instance, I said if it was swollen too badly, too much injury there, it would be best to dress it for a day or two and let some of the swelling disappear, before you could handle it.

Q. Before you put anything on?

A. Yes, sir.

Q. Then you would put on splints?

A. I would put on, if I put on any splint, I would have put on an extension, to extend the bone and bring them together.

Q. But splints?

A. Yes, extension splint, that is what I would have put on.

Q. Then there would have been two purposes—

A. I would always have an opening to treat that wound.

— Q. There would be two purposes that you would have. One, you would put on splints so as to hold the bones in apposition as near as possible, and the other the extension weight to pull the bones so that the ends would come nearer together?

A. Well, that would all take place when any one put a plaster paris cast splint on.

Q. Or splints.

A. No. You could not get an ordinary anterior and posterior splint to act as an extension.

Q. You mean by extension the weight you put on?

A. No. By putting on a cast, put it on so by having some one hold the hand and extend it, pull it so that the bones got together and then apply the cast, using this part of the arm, resting here, to pull against one another, and then when it is all dry, the casting is all dry, you cut a window over that part.

Q. That is the way you would do it?

A. That is the way I would do it, yes.

Q. You say after it became infected, then the proper thing to do would be to wait until you cleaned up the infection?

A. I would have had an extension on there right along.

Q. But before you would undertake to put on—to cut down in there, and put the plates on the bone, you would have waited until the wound was clear of infection?

A. Oh, if we had it in good position by this extension the bones might have—

Q. Won't you please answer the question?

A. I did not understand you.

Q. I say, before you would cut down to put on

plates on the bone, you would wait until the wound healed and was clear of infection?

A. If they were still out of place I would have to wait.

Q. And as a matter of fact you did wait?

A. In this case, yes.

Q. Now the bones did not unite, I understand you to say?

A. No, sir; but they have a slight fibrous union.

Q. You have had a good deal of experience in broken bones?

A. I have had a fair amount. We have a great deal of it among sailors.

Q. Now, I understood you to say that there was so much damage to the periosteum, that is the skin over the bone?

A. That is the membrane that goes over all bones; that is where it feeds from.

Q. That is the periosteum.

A. Yes.

Q. There was so much damage to that—

A. There was a good deal of damage to it.

Q. On account of the severe injury?

A. It was evidently on account of the severe injury; the infection probably had a good deal to do with it.

Q. Infection had a great deal to do with it?

A. Yes.

Q. Now then, you think that that was the reason why, one reason why, the bones did not unite?

A. What was?

Q. Damage to the periosteum and the infection?

A. Both together, yes, sir.

Q. It is true, is it not, that you find occasionally a man or person who is injured, that it just seems impossible to get bones to unite?

A. Oh, we have very stubborn cases, yes.

Q. You often have stubborn cases?

A. Yes, sir.

Q. And you can take two different men, individuals, and treat them both exactly alike, and one of them his bones will unite all right and the other one will not, and you will have difficulty, in the same kind of injury?

A. Sometimes you will have some cases buck on you and you will not be able to.

Q. So that in every case it depends a good deal upon the physical condition of the individual, something that we hardly know about?

A. It generally depends altogether on that, but good physical condition helps a good deal.

Q. And do you not often find in an injury and accident where there has been a compound fracture of the bone of the arm or the leg, that the question of the result depends a great deal upon the individual and his individual physical condition, as well as upon the skill and the method of treatment?

A. It depends on the vitality a good deal; a good deal depends on that.

Q. And sometimes a man that fractures his arm or his leg especially a compound fracture and a doctor does everything in his power, and it is impossible for him to bring about good, perfect results, perfect union of the bones?

A. At times, in some cases they have had to have several operations.

Q. What further treatment do you think is now necessary to bring about a union of the bones in the arm?

A. That is a hard question to answer, because I do not know just to what extent—how much life there is in those bones now. I cannot tell.

Q. You cannot tell?

A. No.

Q. The wound has healed?

A. Yes; everything healed up in eight days.

Q. And it has been healed right along?

A. Yes, sir.

Q. Now, if there was any necrosis of the bone there, that would prevent healing; that would show from the outside pretty soon. would it not, that is there would be a breaking out, a running sore?

A. If there was any dead bone in there, it would be very apt to; yes, sir.

Q. Well, would you expect that if there was any dead bone in there at all, even from the small pieces or fragments, or necrosis, dead, dying bone, decaying of the bone, there would be an open, running sore there?

A. Most always there will be a discharge from them.

Q. Now, in case of that kind—in case of this kind, there are several ways of treating it, is there not? For instance, in cutting down and scraping the bones and bringing them in position again, and giving nature an opportunity to unite them? And, if there is fibrous tissue formed or cartilaginous tissue formed between the ends of the bones, that that should be broken up, by putting him under anesthetic and rubbing the bones together and give a new chance to heal the bones in that way? You know of these kind of cases?

A. Yes, but I do not think the last will apply at all to this.

Q. You do not think it will be?

A. Not the last one.

Q. Where there has been what we laymen call false union, soft tissue?

A. That will help with it, yes.

Q. I understood you to say that these bones adhered together?

A. One of them seems to have some fibrous union.

Q. Are they in perfect position now?

A. No, sir; not at the present time. One is at an angle, that is all. The other one is not.

Q. Now, then, you cut down finally and put on plates on to the bones?

A. I have done that once. That is the operation I did do. It did not hold.

Q. It did not work. You then had to cut down and take them off?

A. I have not taken them off yet.

Q. They are still on there?

A. Yes, sir.

Q. Have you ever cut down and tried to do anything since you first put on the plates?

A. Not tried to cut down, but I tried that manipulation that you speak of.

Q. You tried that?

A. Yes, sir.

Q. You have not cut down and scraped the bones and got them together?

A. No, sir; not yet.

Q. That is really the up-to-date method, where bones do not unite, is to cut down and scrape the ends of the bones?

A. Plate them.

Q. And wear them back, or plate them?

A. Yes.

Q. That has not been done?

A. No, sir; not the second time.

Q. When did you, if you remember, first cut down and put the bones together with the plates?

A. I think it was March 8th, 1913.

Q. I will call your attention to libelant's exhibit "B" for identification, and ask you if that is the way those plates were put on in March, 1913, as you have testified?

A. Yes, that looks very much like the bones, but the

bones were in a straight position at the time; they did not have that angle at the time.

Q. Straight position at the time?

A. Yes.

Q. At any rate, these plates that you put on at that time are still there?

A. Yes, sir.

Q. And no effort has been made since then to treat the bones, so far as cutting down?

A. Not so far as cutting down.

Q. And take off the plates or trying to get the bones to heal?

A. Only by that manipulation treatment after the bone was loose; tried that to irritate it, but it would not do.

Q. Do you know how old a man Mr. Fondahn is?

A. I gave his age at 47 on his admission to the hospital.

Q. Now how as his health?

A. He appeared to be apparently in excellent health.

Q. Well, if he is in excellent health, what are the chances in cutting down and fixing that arm?

A. The chances of cutting down—if he is to be operated on again he may have some union there between the bones, he may have.

Q. As a matter of fact, doctor, in the advanced stage of your profession, that is one of the well recognized methods of treating a non-union of bones, the cutting down and scraping the ends of the bones and bring

them back into apposition and hold them there until nature unites them?

A. That is one of the ways.

Q. That is now recognized?

A. That open method is recognized highly by the profession.

Q. The open method, such as I have stated?

A. Yes, sir.

Q. Have you ever done that yourself?

A. You mean applied plates?

Q. Have you ever had experience in cutting down and scraping the bones and putting the bones together, after they failed to unite?

A. Yes, I have.

Q. Ever been successful?

A. Why, yes.

Q. The profession generally views this as a successful way of treating bones when they refuse to unite in the first instance?

A. That is one of the processes.

Redirect Examination.

Q. (MR. LANDON) : Doctor, what in your opinion, is the condition of the ends of these bones?

A. Well, it looks to me like there might be a slight union, a fibrous, soft tissue union between the bones. That would give the faint light between the two. (Examining X-ray exhibit).

Q. The screws shown on exhibit B, is that the way they were put in?

A. They were put into the bone—the arm has kind of dropped on account of the drawing up of the muscles.

Q. And did the screw give way?

A. They have been pulled out there some and some bending of the plate, a little bending or springing of the plate.

Q. What about any bandages being on the arm at the time he came?

A. There was anterior and posterior splints, either felt or wooden splints. One on the anterior part of the forearm and one on the back part, and a bandage held them in place.

Q. Bandage of what?

A. Bandaged completely.

Q. When a wound becomes infected, such as that, what do you do?

A. The only way to do is to treat the wound until you get to the infection; clear all the pus out of the wound.

Q. Would that be the reason you would leave the opening there?

A. Yes, I would have to do it so that I could treat it under the splints.

(Witness excused.)

GUST FONDAHN, recalled, testified in his own behalf as follows:

Q. (MR. LANDON): I show you libelant's exhibit "B" for identification, and ask you what that is?

A. That is a picture taken of my arm seven weeks after the operation.

Q. After the operation performed by Dr. Carter?

A. Yes, sir.

Q. Where?

A. That was taken at Fort Worden.

Q. By whom?

A. By the government doctor. They have got the plates in the marine hospital now.

Q. And this identification "A?"

A. The reason why the doctor has not seen this one (B), the doctor went to Alaska three days before it was taken.

Cross-Examination.

Q. (MR. HULBERT): Now, referring to libelant's exhibit "B" for identification, you say that was taken seven weeks after the plates were put on by Dr. Carter?

A. Yes, sir.

Q. And where was that taken?

A. Fort Worden.

Q. How long was it after the operation was performed before you went to Fort Worden?

A. Seven weeks.

Q. (MR. LANDON): You went up there for the purpose of having the pictures taken?

A. Yes, sir, on the 27th of April.

MR. LANDON: I offer these identifications in evidence.

Photographs marked libelant's exhibits "A" and "B," respectively, filed and returned herewith.

(Witness excused.)

DR. P. I. CARTER; examination of, resumed:

Q. (MR. LANDON) : Why were these pictures taken at Fort Worden?

A. Our machine was not in working order then. We took him up there because they have an excellent machine.

Q. That is the nearest one to you?

A. It is right in town.

Q. Has Fondahn been up at your hospital all the time since his injury?

A. All the time I have been there; I was North a few months.

Q. You are there at the present time?

A. Yes.

Q. Fondahn still confined there?

A. Yes, sir.

Q. Has he been under your treatment?

A. He has been under the care of the hospital, different doctors when I was away. He has been there all the time since that.

Q. (MR. HULBERT) : Do you know whether it has been suggested to him by yourself or other doctors, that another operation be performed, such as you stated here, and which is a recognized operation in cases of this kind?

A. It has been suggested, yes.

Q. Why has it not been done?

A. Well, he has practically told after the operation that there would not be much hurry, or much doing, on account of it being better to let the arm get in as good condition as possible, and then try again.

Q. Who was he told that by?

A. Myself.

Q. You say now he is in proper physical condition. Do you know whether he is waiting until after this lawsuit is disposed of?

A. I do not know anything about that. I am just telling you that?

Q. But it has been suggested to undergo that operation for the purpose of getting these bones to unite?

A. To undergo some operation.

Q. Now this picture, exhibit "B," that was taken seven weeks after the operation, that shows some of the screws have been partially pulled out of the bone, and at least one of the plates is badly sprung or bent, does it not?

A. Yes, sir.

(Witness excused.)

GUST FONDAHN, examination of, resumed:

Q. (Mr. Landon) You are located at Port Townsend still?

A. Yes, sir.

Q. You have been there all the time?

A. I have been there all the time.

Q. You are all right but your arm? Your arm is the only thing that is the matter with you?

A. I have never been sick one day in my life. Everything healed up in eight days following the operation
(Witness excused.)

DR. P. I. CARTER, examination of, resumed:

Q. (Mr. Hulbert.) The witness Fondahn means after you cut down?

A. Yes, that is what he means.

Q. The condition of these screws on the plate there indicates that there has been considerable strain on that after that operation, does it not, doctor?

A. Either due to the destruction of the muscles during the accident——

Q. It shows there has been considerable strain there?

A. There has been contraction there of the ends.

Q. Bending the plate, tearing out the screws from the bone indicates there has been some strain?

A. It undoubtedly is contraction of the muscles or tissue where the destruction was, from the accident.

Q. There could be strain otherwise?

A. Yes.

Q. That is simply an expression of your opinion?

A. Yes, sir.

Q. But it indicates that there has been considerable strain there to cause these screws to be pulled out?

A. Yes, there is some contraction or strain there.

Q. (Mr. Landon.) Just examine Fondahn's arm at this time and tell us the condition.

A. Well, it is hard to tell without seeing it. If I remember right, one of the bones, I forget which one it is, is entirely away from opposition, is overlapped. The other seems to have some fibrous union.

Q. Now, doctor, look at the arm. You see the movement in there, don't you?

A. Yes.

Q. What is that movement, about?

A. Yes, at the side of the old fracture.

Q. How much movement?

A. Several degrees; impossible to tell how many.

Q. A couple of inches?

A. I do not think there is two inches movement there, but there is some movement.

Q. From his elbow to the end of his fingers there is several inches?

A. There is a drop down of ten or fifteen degrees from the right hand.

Q. Also the arm is bowed?

A. Yes.

Q. It is very plain that the bones are not grown together?

A. Yes, sir.

(Witness excused.)

GUST FONDAHN, examination of, resumed:

Q. (Mr. Landon.) You have considered another operation of this arm, have you?

A. Well, I am in the government hospital, that is not up to me.

Q. Did you consider having another operation?

A. Stand a chance of losing my arm. If I could go to the Rockefeller Institution and have Dr. Caryl put monkey bones in, graft them in, it can be done. But I may lose my arm.

Q. Your arm is of no practical use?

A. No.

MR. HULBERT: I object as leading.

MR. LANDON: I will withdraw that.

Q. How old are you?

A. I am close to forty-three now.

Q. At the time you were injured you were about forty-one?

A. Yes, just about the same time of year.

Q. You have performed no labor since your injury?

A. No, sir.

(Witness excused.)

DR. P. I. CARTER, examination of, resumed:

Q. (Mr. Hulbert.) Doctor, at Port Townsend, where this libellant has been, is the main marine hospital on the Sound?

A. Yes, sir.

Q. It is really headquarters?

A. Yes, sir, for the Puget Sound district.

Q. They are equipped there with surgeons and the necessary hospital facilities for any kind of operation?

A. Dr. Earle is in command of the service station at Port Townsend. He was there at the operation.

Q. He is the naval surgeon?

A. He is of the public health service, yes.

Q. You have there all the hospital facilities and equipment necessary to perform any sort of operation?

A. We have a fairly well supplied hospital, not everything, no. But very few have everything.

Q. But you have facilities there for taking care and performing operations on this arm known and recognized?

A. We have the facilities there for another bone operation, the kind done before.

Q. And that is a recognized operation for that?

A. That, and of course he spoke of monkey bones, the placing of new bones, bone chips in the arms, but we haven't got that stuff there.

Q. That can be obtained there the same as the doctors in Seattle can obtain them, or any place else?

A. We probably could get it, yes.

Q. In other words, where they used to use and do use yet, plates, some of the surgeons use bones?

A. Yes, and some use water.

(Witness excused.)

Hearing adjourned.

Seattle, Washington, Oct. 23, 1913.

PRESENT:

Mr. Landon, for the libelant.

Mr. Shorts, for the claimant.

(Testimony taken pursuant to stipulation on page 1 of this record.)

Claimant's Testimony.

CAPT. HARRY THOMPSON, a witness called on behalf of the claimants, being duly sworn, testified as follows:

Q. (Mr. Shorts). Your name is Captain Harry Thompson?

A. Yes, sir.

Q. How long have you been going to sea, captain?

A. Since 1883, thirty years.

Q. How long have you held master's papers?

A. Since 1895.

Q. And during that time you have been on sailing vessels most of the time?

A. Mostly always, yes.

Q. Sailing on what oceans?

A. On the Pacific.

Q. Particularly in the coastwise trade?

A. Mostly in the coastwise trade.

Q. You have made trips from Puget Sound ports to Southern California ports many times?

A. Lots of times.

Q. Now, in January of this year, you were master of the schooner C. S. Holmes?

A. Yes, sir.

Q. And at that time she was engaged in making a trip from San Francisco to Puget Sound and return?

A. Yes, sir.

Q. You had, as one of the members of your crew, Gust Fondahn?

A. Yes, sir.

Q. How long had he been with you, captain?

A. Oh, I believe since the 10th of May. He made several trips with me.

Q. Been with you from about the 10th of May, 1912, up until the time he was injured?

A. Yes, sir.

Q. Now, on the day in question, January 3d, 1913, your ship was in tow of a tug to tow her to sea?

A. Yes, sir.

Q. Where did you pick up the tug?

A. At Neah Bay.

Q. What was your cargo?

A. Piles and poles.

Q. Where were you bound for?

A. San Francisco.

MR. LANDON: I give notice now that at the proper time I will move to amend my libel to conform to the proof as to the condition of the weather, and that it was not such weather as was proper to take a vessel to sea in. Also for the thirty dollars paid for doctors' fees, and his wages for the round trip.

Q. Now captain, about how far were you off Cape

Flattery on the afternoon of January 3rd, 1913, when the tug signaled you to let go the hawser?

A. As near as I can judge, it was about ten miles or so.

Q. What time of the afternoon was it?

A. About six o'clock.

Q. Was it light or dark?

A. Dark.

Q. Did you see Fondahn get hit with the spring of the hawser as he was casting it off?

A. I did. I cautioned him to get out of the way.

MR. LANDON: I move to strike that part of the answer as to cautioning him to get out of the way, as not responsive to the question.

Q. What, if anything, did you say to him at the time he was casting off this hawser?

A. I told him to be careful and get out of the way after he cut the lashings loose, to get out of the way and run. He did run, but he was not quick enough.

Q. There was no difference in letting go this hawser in this case than in any other case where you let go a hawser?

MR. LANDON: I object as calling for a conclusion.

A. Naturally if you let go a hawser in smooth water or if you let it go at sea there is a difference, that is natural.

Q. There was a sea running at that time?

A. There was quite a sea, but not dangerous sea. They were all right.

Q. How far were you standing from him at the time he was injured?

A. About 12 feet.

Q. Where were the other members of the crew?

A. All of them were around there. Some were around there. I did not pay particular attention?

Q. Was there any one helping him cast off this hawser?

A. I believe there was some of them with him, but he was the last one to get away from there.

Q. Was it customary for the end of the hawser to swing around when you are casting it off?

A. It all depends on the weather.

Q. Well, in a sea of the kind that was running at that time?

A. That is the only way to let it go, when you want to get ready and let it go.

Q. Well, after he was struck with the hawser, what did you do then?

A. I went down, I was the first one down there to see how badly he was hurt.

Q. What did you do or say to him?

A. I asked how he was hurt and he said, my arm is broke, and we got him into his bunk. And after I examined the man to see how badly he was hurt I got up utterly useless to signal, and I put the vessel around on deck and the tug was so far out of sight it was and sailed back. We had a fair wind.

Q. Did you try to signal this tug that just cast you off to pick you up again?

A. There was no use trying because she was out of sight. I simply turned the vessel around and commenced sailing back.

Q. Why did you turn the vessel around and start back?

A. Because the man was injured. We had a fine fair wind going down the coast otherwise.

Q. Did you put back to get medical care for him?

A. Certainly. As soon as I got the vessel on the course, made the course to Cape Flattery, I went down to him and attended to him the best I could, bandaged him the best I could.

Q. What did you do?

A. Washed his arm and put splints on and bandaged it up.

Q. Did you do all you could for him at that time?

A. Certainly.

Q. Well, about what time was it now, by the time you got your vessel headed back on her course into the straits?

A. When I turned, you mean?

Q. Yes.

A. Well, it might have been half an hour after the accident happened; probably half an hour but no more?

Q. Did you make any effort to pick up a tow then?

A. Not there, there was no tow, but as soon as I got off Neah Bay I did. The same tug came out, the Goliah.

Q. The same tug came out from Neah Bay?

A. Yes, she got in ahead of us.

Q. What did you say to the tug?

A. The captain asked me what the trouble was and I told him one of the men got badly hurt and I wanted to get him to a doctor as soon as possible.

Q. Did you ask him to take you in?

A. I asked him to tow me up the Sound, but he said he had to wait for a vessel, but he would send the other tug out, but in the meantime to keep on sailing and the Prosper would come along and take us up.

Q. What tug was it took you out?

A. The Goliah, Captain Tom Nelson, of the Puget Sound Tow Boat Company.

Q. What did the captain say to you when you told him you had an injured man on board?

A. I asked him if there was a marine doctor in Port Angeles, and he said yes, certainly.

Q. You asked Captain Tom Nelson if there was a marine doctor in Port Angeles?

A. Yes, sir.

Q. What did he say?

A. He said certainly there is.

Q. Now, after you had your talk with the captain and he told you he could not take you on down the straits in tow because he had another tow to make, what did you do?

A. I told him to rush back to Neah Bay and send the other tug as soon as possible to pick us up.

Q. Did he do that?

A. He did.

Q. And in the meantime you kept on your course down the straits?

A. Yes, sir.

Q. How long after that was it before this other tug came up and picked you up?

A. Well, the ship's log book should show that. I believe it was somewhere about ten o'clock.

Q. Ten o'clock that same night?

A. Yes, somewhere about ten o'clock.

Q. What was the name of this other tug?

A. Prosper.

Q. Did you see the captain of the tug Prosper?

A. John Hogan. | I am not quite sure, but some such name as that.

Q. She belonged also to the Puget Sound Tow Boat Company?

A. Yes, sir.

Q. Now is Captain Tom Nelson of the Goliath and Captain Hogan of the Prosper, are they still in these waters so that we can locate them?

A. I guess they are both working for the Puget Sound Tow Boat Company.

Q. Now when the tug Prosper came out and picked you up, did you have any conversation with her captain?

A. I asked the captain also the same question, if he knew there was a marine doctor at Port Angeles, and he said the same.

Q. What did he say?

A. He said there is.

Q. Why did you ask him that question?

A. To make sure. I wanted to get the man in to the nearest doctor.

Q. Did his tug then pick you up?

A. He did.

Q. And took you in tow down the straits how far?

A. We were off Clallam Bay.

Q. How far down the straits did he tow you?

A. From there to Port Angeles.

Q. What time did you get into Port Angeles?

A. About between five and six o'clock in the morning. The ship's log will show that.

Q. And you dropped anchor then off Port Angeles?

A. In Port Angeles harbor.

Q. What became of the Tug Prosper then?

A. First he went over to the Snohomish, the life saving tug, she was in the harbor, and he notified them that we had an injured man aboard. After that he went in to the wharf and came straight back to the vessel. In the meantime a boat with an officer and sailors from the Snohomish came alongside, and that was about half an hour after we anchored. When they got alongside——

Q. Did you have any conversation with the officer of this boat from the Snohomish?

A. Yes, sir, I did, naturally.

Q. The Snohomish is a government life saving boat?

A. Yes, sir.

Q. What conversation did you have with the officer from this boat?

A. I asked him what he wanted, and he said I understand you have a sick man aboard and we were sent over here to take him ashore.

Q. What did you say?

A. I said that is all right, as soon as we got ready we would go along with them.

Q. Did you ask him if there was any marine doctor there?

A. I did, and he said there is a doctor here.

Q. Well, what did you do when the tug Prosper came up alongside again?

A. The Prosper came alongside, but we all agreed that it would be safer to put the man on the Prosper instead of taking him in the small boat, and the captain of the Prosper came alongside the ship and he and I went ashore on the tug.

Q. By "he" you mean Mr. Fondahn?

A. Yes, sir. And also the Snohomish boat came with us, towing behind the tug.

Q. Where did you land him in Port Angeles?

A. At the dock.

Q. What did you do as soon as you landed him?

A. As soon as we landed him, the officer of the Snohomish and I—he knew the doctor and I did not, and he and I went in and rang up the doctor; it was still early, just breaking day, and he got the doctor. I telephoned and told him to come down as soon as possible as

there was a sick man to be attended to, and he promised to come.

Q. Did you stay on the dock or go up to the doctor's office?

A. We went up to his office and waited for him.

Q. How far was it to his office from the dock?

A. Oh, about two city blocks.

Q. Who went up to the doctor's office?

A. Why, the officer from the Snohomish showed us the place.

Q. And Mr. Fondahn and yourself, the three of you?

A. Yes.

Q. Now what time did you get to the doctor's office do you think, captain?

A. It was probably about eight o'clock, as near as I can remember, between eight and nine. I did not take the time. I know we had to wait a little while before he came.

Q. How did you get up there?

A. Walked up there.

Q. All of you walked?

A. Yes.

Q. And was the doctor at his office when you got there?

A. No, I guess we met him on the street.

Q. On the way to the office?

A. Yes.

Q. And he turned around and walked back with you?

A. That is something that I really do not remember how it happened, where we did meet the doctor. I guess we did meet him on the street. I know the officer from the Snohomish introduced me to the doctor, but whether it was on the street or not I do not remember that. That is something I cannot swear to.

Q. Well, what did you say to the doctor?

A. When we got to his office we had quite a talk. I asked him if he was a marine doctor and he said yes, he handled the marine cases.

Q. What did you say about Mr. Fondahn being hurt there?

A. I told him that the man had his arm broke and I had tried to fix it up myself in the evening, but it was now about fourteen hours after the accident happened and needed attendance, and of course asked him if he was a marine doctor and he said yes. I had a hospital permit and wrote it out at his desk, and I asked him if he would accept that and he said yes.

Q. And did you turn the permit you made out over to this doctor?

A. Right there, right in his office.

Q. Did he seem to know what it was? Did he ask any questions about it?

A. I took it for granted that he knew what it was. He did not ask any questions about it at all. I advised him to communicate with the hospital people in Port Townsend regarding the man, because he could walk at the time, and he could go right aboard some steamer

for Port Townsend that same day if the doctor would say so.

Q. Now what, if anything, was said by him about pay for his services in taking care of the man?

A. There was not a word said about payment at all.

Q. He took the permit you made out?

A. He took the permit I made out, and I told him that the man is now in your care.

Q. What did he say?

A. He said that is all right.

Q. What did the doctor do with him then?

A. He took him to the hospital, he and his brother has a hospital there.

Q. At Port Angeles?

A. Yes; it is customary in small places, where there is no regular marine hospital, the government has a ward in a private hospital.

Q. They took him up to this private hospital, did they?

A. Yes, sir.

Q. Did you go up to the hospital yourself to see him?

A. I went out afterwards.

Q. What time, captain?

A. About twelve o'clock.

Q. The same day?

A. The same day.

Q. Did you see Fondahn there in the hospital?

A. Yes.

Q. What condition was he in when you saw him?

A. He seemed quite happy; he had his arm all fixed, lying in bed. I had quite a long talk with him.

Q. Did the doctor say anything to you about paying for his services in taking care of the injured seaman?

A. Not a word.

Q. How long did you stay at the hospital?

A. Oh, probably half an hour.

Q. Did you pay Mr. Fondahn for his wages?

A. I did, right there?

Q. Paid him off in full there, did you?

A. Yes, right there.

Q. Well then, what did you do?

A. Then I went back to attend to my business.

Q. Back to your ship and went to sea?

A. Went to sea the following day. I could not get a tow that day, I could not get a tug.

Q. Now I will ask you, captain, if this is your first experience of having men hurt aboard ship?

A. No, it is not the first. I have had lots of them?

Q. I will ask you if there are marine doctors in practically all of the ports on Puget Sound?

A. Well, there is only one marine hospital on Puget Sound, that is at Port Townsend, but there are doctors appointed as marine doctors to attend to marine patients. There is one right here in Seattle and there is in Tacoma. And I have had a case in Bellingham and in Tacoma both, where the same thing happened, where a private doctor acted as marine doctor, and he accepted

the hospital permit, and puts the patient in a private hospital in which the government supplies a ward.

Q. And keeps them there how long?

A. I really don't know what the time is. It used to be sixty days. It was reduced to thirty. Now I do not know what it is. They will keep a patient there longer if he is unable to move.

Q. Just what did they do with him?

A. Sent him to the marine hospital.

Q. Did you ever take any injured seaman of your crew on this vessel or any other vessel, to the marine doctor at Bellingham?

A. I did.

Q. Did you make out a permit just as you did in this case?

A. I did, sir.

Q. Did the doctor there accept it and treat him?

A. They did and that is all. I had a man with a broken leg up there one time.

Q. Have you done the same thing in any other ports?

A. Tacoma, and in San Pedro several times.

MR. LANDON: I object as not the best evidence.

Q. Was there ever any doubt in your mind but what this doctor, Taylor, that was his name, at Port Angeles, was a marine doctor?

MR. LANDON: I object as incompetent, irrelevant and immaterial.

A. There is no doubt at all. Of course the man told me so himself, and this man was listening to it and could hear. (Referring to libellant.)

Q. What inquiry had you made as to whether there was a marine doctor in Port Angeles?

A. From the two tug captains, and that officer from the Snohomish, they all told me the same thing. I took that as a good guaranty from the character of the men I asked. And I asked the doctor point blank whether he was a marine doctor and he said yes.

Q. Now, if he had told you that he was a private doctor, would you have made out the same certificate?

MR. LANDON: I renew my objection.

A. I might have made it out, but would he have accepted it?

Q. What would you have done with him if he had told you he was a private doctor?

A. I naturally would have had to offer to pay him or guarantee his payment for the sum. He would ask for a guaranty.

MR. LANDON: I object to this line of testimony as immaterial.

Q. Did Mr. Taylor at Port Angeles make any objection at all to accepting the patient and accepting the hospital permit?

A. None at all.

Q. Did he ask any questions about how he was to be paid?

A. He never did.

Q. What treatment Fondahn received after you left, of course you do not know?

A. No.

Q. Now, why did you put into Port Angeles instead of continuing down to Port Townsend?

A. I did that simply because it was 12 hours after the accident when we arrived at Port Angeles, and I knew the man's arm was in bad shape, and it was up to me to get him to the nearest doctor. If I had kept on and gone to Port Townsend we probably would have got there late in the afternoon, and it would have been so much further, so much longer time, and his arm was in bad condition without medical attendance.

Q. Did you believe that you could get proper treatment from the marine doctor at Port Angeles when you put in there?

A. I certainly did. The man being a regularly licensed doctor the man should get good treatment. Besides, the law says, I believe, that I should go to the nearest doctor.

Cross-Examination.

Q. (Mr. Landon). Now did the libelant ask you to go to Port Townsend when he was injured?

A. Not when he was injured; after we anchored at Port Angeles.

Q. Did he not ask you before that?

A. No.

Q. Did you make any remark at any time that it would cost you a hundred dollars more?

A. At the same time when he asked about going to Port Townsend, yes, I did. I said it would be an unnecessary expense to do it.

Q. As a matter of fact you could have got him to Port Townsend just as quick as you got him on the wharf anyway, could you not?

A. Well, if you know anything about the Sound, you would not ask that question.

Q. Now, let us see, it is twenty miles from Port Angeles to Port Townsend?

A. I am not sure.

Q. How many miles is it?

A. I would not say; I do not know.

Q. You do not know how many miles it is or how long it would take?

A. I know it would take at least six hours.

Q. Assuming that you got to Port Angeles at three o'clock in the morning?

A. We did not.

Q. I say, assuming that, then you could get to Port Townsend at nine o'clock the same day?

A. Might or might not, that would depend on the weather.

Q. What was the condition of the weather at the time you would have arrived at Port Townsend?

A. The weather was all right at the time we arrived at Port Angeles. But suppose I could not have been able to get there with a small tug, it would have been up against me for not going into the nearest port.

Q. You were not afraid of that?

A. Yes, I was, because that has happened before.

Q. What excuse have you to give for not going to Port Townsend?

A. I went to the nearest doctor.

Q. What was the excuse you gave at that time?

A. To go to the nearest doctor.

Q. What was the excuse you gave? You just testified that you told him it would cost a hundred dollars more?

A. That was a side issue, a side remark.

Q. It was a side issue?

A. It was at the time.

Q. You mentioned the side issue rather than the main one?

A. I did at the time, sure I did; I will admit that.

Q. The day before there had been a heavy gale out there when he was injured?

A. Yes, sir.

Q. And that had died down?

A. Not quite.

Q. Well, it was fair weather when you landed at Port Angeles?

A. Yes.

Q. No danger signals whatever about the weather?

A. No.

Q. How much did you give this libelant when you landed at Port Angeles?

A. When I paid him?

Q. Yes.

A. I do not remember. I guess he knows better than I do. It is on the articles. I do not remember.

Q. You heard his testimony that you paid him up to the day he was injured?

A. Paid him up to the time we arrived in Port Angeles, that is correct. The amount I do not remember.

Q. You remember distinctly, do you, of not having any controversy as to who would pay, nothing said about that?

A. Not one word when he accepted that permit.

Q. He accepted that permit?

A. Yes, sir.

Q. And you remember that you asked him if he was a marine doctor?

A. Yes, sir.

Q. And he told you he was?

A. Yes.

Q. And he said nothing at all about the permit that you were giving him?

A. No; he accepted the permit. I says, will you accept this and he says yes.

Q. What was that permit, allowing him to go where?

A. To a marine doctor.

Q. To a marine doctor, that permit was?

A. Yes. Any marine doctor will accept that permit.

Q. And after you had given him that permit you told him that he was off your hands and on his hands?

A. Yes.

Q. How did that question happen to come up?

A. I told him that when I left there.

Q. Why did you volunteer that statement, if you did volunteer it?

A. I do not remember the circumstances.

Q. Was not the doctor questioning the validity of the permit and you told him that he was off from your hands and on to his; now was not that the way it came up?

A. No.

Q. There was nothing said?

A. Not that I remember, no.

Q. You are interested in this vessel, are you, captain?

A. I was at the time.

Q. You still work for the company?

A. I do.

Q. Work for what company?

A. J. E. Billings.

Re-Direct Examination.

Q. (Mr. Shorts.) Now, captain, proctor for libelant seems to infer that the reason you put into Port Angeles instead of going to Port Townsend was that it would cost you a hundred dollars more to go to Port Townsend. I will ask if that was the reason?

A. It was not.

Q. What was the controlling reason that took you into Port Angeles instead of continuing to Townsend?

A. I told you. There have been several cases and Billings had to pay, that I know, where the captain did not put into the nearest port when a man is injured.

Consequently as I have told already, the nearest port—the nearest place I could get a doctor, and it was up to me to do so, and I was afraid in case I did go by Port Angeles and anything happened after that that we would have a damage suit.

Q. I will ask you if you did everything in your power to help and aid and care for the injured man as long as he was aboard ship?

A. I believe I did.

Q. And did you do everything that you could to provide him with medical care and attendance after you got him ashore?

MR. LANDON: I object as calling for a conclusion.

A. I did.

Q. You do not know anything about the circumstances of Mr. Fondahn leaving the hospital at Port Angeles?

A. Not at all. This is the first news I have had of it.

Q. You are no longer connected with this vessel in any way?

A. Not the C. S. Holmes; no.

Q. Have no interest in her?

A. No.

(Testimony of witness closed.)

CAPT. HARRY THOMPSON, recalled, testified as follows

(after examination of libelant in rebuttal):

Q. (Mr. Shorts.) You have just heard the libelant state what took place at Port Angeles as to what was stated to the doctor. Now is what he stated true?

A. As I remember no such thing happened. I asked him point blank if he was a marine doctor and he said yes, otherwise why should he accept that permit at all?

Q. Did he ask you to explain the permit to him in any way?

A. No, I do not remember him saying or asking any explanation of it, but I advised him to communicate with the hospital authorities in Port Townsend regarding the man. Of course at the time I thought all he needed was simple treatment right there, and he could go aboard the boat and go to Port Townsend the same day, but the doctor insisted on taking him to the hospital.

Q. Did the doctor say or do anything to lead you to believe that he did not fully understand what this marine hospital permit was?

A. No, I did not think so at the time and I do not think so now.

Q. Did you think at the time he fully understood it?

A. I did. Of course I have had so many cases in small places where there are marine doctors, they have acted in the same way, accepted the permit and took charge of the patient and then he is off the captain's hands.

Q. Was there anything unusual in your statement to the doctor that the injured sailor is now in his charge?

A. No, the same as I would say to any other marine doctor. I would say the same thing.

Q. Why did you say that to him?

A. I do not remember just the circumstances, but when I said good bye to him or something, I says now the man is in your charge and off my hands, and in your charge.

(Testimony of witness closed.)

Hearing adjourned.

Seattle, Washington, April 12, 1915.

PRESENT:

Mr. Landon, for the Libellant.

Mr. Hulbert, for the Claimant.

DR. W. J. TAYLOR, a witness called on behalf of the Claimant, being duly sworn, testified as follows:

Q. (Mr. Hulbert.) State your name in full, doctor?

A. W. J. Taylor.

Q. What is your business or profession?

A. Physician and surgeon.

Q. Are you a graduate of any medical school?

A. Yes, of Ontario, Canada.

Q. And are you licensed to practice in the State of Washington?

A. Yes, sir.

Q. How long have you practiced in the state of Washington?

A. Seven years this last January—six or seven.

Q. Have you taken any post graduate courses?

A. Yes. Took a post graduate course at the Poly-

clinic of Chicago, and also a post graduate course in the Rush Medical College.

Q. Where are you practicing now?

A. Port Angeles, Washington.

Q. How long have you practiced in Port Angeles?

A. Since I came out here; I took the State Board examination in January. That was either six or seven years ago—seven I am pretty positive.

Q. Are you practicing alone?

A. My brother is associated with me.

Q. Are you interested in a hospital there?

A. Yes, I own a hospital there.

Q. How long have you been conducting a hospital in connection with your practice?

A. When I came to Port Angeles first, there was a general hospital there, and I owned a half share of that; that is how I came to take a half share in that hospital. Then, afterwards, I built a hospital of my own.

Q. And you have been conducting your own hospital since that time in connection with your practice?

A. With my practice, yes.

Q. What is the nature of your practice; is it special or a general practice?

A. General practitioner; I do surgery and medicine both.

Q. What position do you occupy, if any, up there? Any county position?

A. I am county health officer; have been for two years.

Q. And about how many doctors are there at Port Angeles?

A. Eleven.

Q. In general practice, are they?

A. Yes, they all do general practice; none of them are specialists.

Q. How many hospitals are there there?

A. Two.

Q. One besides your own?

A. One besides my own.

Q. Are you the physician of any companies or railroads up there?

A. I am the appointed surgeon for the Milwaukee Railroad there. I received that appointment when the Milwaukee took over that railroad the first of January last. I am the Milwaukee surgeon under Dr. Bouffleur, of Seattle. I have a contract as doctor for the Port Crescent Shingle Mill Company; the Howell, Hill & Ray Shingle Mill; the Hanson, Ballard, Shingle and Sawmill and the Merrill Mill Company. Besides that, work; that is, my hospital has that, the county poor work; we have a contract for that. Also with the Erickson Construction Company while they are building roads there.

Q. You attend to all the surgical and medical work for the county and for these various companies?

A. Yes, sir.

Q. Including the railroad and besides your general practice?

A. And my general practice.

Q. Do you know Mr. Gust Fondahn, the libelant in this case?

A. I know of the man from having seen him January 4th, 1913. I met him first January 4th, I think it was.

Q. January 4th?

A. Yes, that I seen him first.

Q. Under what circumstances did you meet him and in what physical condition was he?

A. At the time I met him it was early in the morning, I think about five or six o'clock; it was dark at any rate. A policeman on the beat on the street called me up and told me that he wanted me and I went out with him, and just across the street at the corner I met two men coming along. One of the men in question was the man you speak of.

Q. Mr. Fondahn?

A. Fondahn. The other was the captain of the boat, the Holmes, I think you call her. And the policeman said here is the man you have been looking for. They told me Fondahn was hurt. I said, all right, we will go right up to the office. We went up to my office and found the man with a broken arm.

Q. Now, is your office in your hospital?

A. Oh, no. I have an office in town on Main street.

Q. Then what did you do with him, doctor?

A. Why, he stayed there in the office—if I remember rightly, he was bandaged up to some extent, when I looked at his arm, casual observation, I noticed that

he had a bad compound fracture, and he was suffering considerable pain and I managed, in the meantime, to get a fire lighted, it was quite cold, and I got the office warm and then I examined him, and told him he would have to have some care taken and that he would have to go to the hospital.

Q. Did you take him to the hospital?

A. Yes, as soon as I could get him there I sent him to the hospital.

Q. Now, what did you do at the hospital with him?

A. We took him there and I got my brother and nurse—the nurse was my brother's wife at that time, and I gave him an anesthetic, took off the bandage and his clothing connected with it, and washed all around the arm and seen the condition of it.

Q. What was the condition of it?

A. The condition proved to be a fracture of both bones of the forearm, a compound fracture; the skin was broken and the muscles were broken, the bones were sticking out.

Q. What was the condition of the muscles and soft tissue about the wound where the bones had protruded, as to whether or not they were damaged?

A. Well, they were all broken, severed and damaged very much; it was not a matter of how much cutting but how much damaged and bruised.

Q. Jammed?

A. I would not call it jammed; it was bruised and broken.

Q. What condition were the bones in, or did you see them then?

A. Both bones were sticking out, and it was a ragged break.

Q. How did the bones appear to be damaged, if you know, or did you make a close examination?

A. I do not catch your meaning.

Q. Well, was it a clean break?

A. I understand now. No, the breaking, if you take a break like that (indicating with a lead pencil), sometimes you would get a break, come down to ends, be concisive. In this the ends were broken and destroyed the covering of the bone, the periosteum was broken and torn along the ends both ways. It was about as bad a break as a person would want to see. I call it a very bad fracture. The periosteum was shattered and also the muscles; the periosteum, the covering of the bone, was broken and turned back.

Q. Now, let me ask you, what effect would that have on the union of the bones, do you think?

A. It would retard the union.

Q. Would make the union of the bones more difficult, would it?

A. Yes, sir.

Q. Now, how was he dressed when you first met him?

A. He had on rough, heavy clothing, rough, heavy shirt.

Q. Like the ordinary sailor?

A. Like the ordinary sailor would have. And the clothes were very dirty, and his arm was also very dirty. At the time we got him up there, there were bits of the shirt where the break was in the cut and in the wound.

Q. Fragments of the wool, you mean?

A. Yes, of the shirt and coat.

Q. Now, then, what did you do in the way of dressing and washing and the use of antiseptics or anything else for the wound? Just go ahead and explain.

A. Well, I do not know that it is necessary to tell you but I have had practice doing this kind of work almost all the time. We followed the general way of doing that, washed it thoroughly with antiseptic soap, got all the dirt and fragments out of the wound. We did that first, cleaned all the arm, removed all the clothing, all the shreds from it and got it good and clean. We took him to our surgery, our operating room, and we have an operating room equal to any in the State of Washington. We took him there, got him clean; applied iodine all in the wound; then I sewed up the muscles as best I could—adapted the bone the best I could, and got the wounds together and put on a dressing of splints, felt splints to hold it in place, and left it there, and it would have healed up if there had been a union; if not, then I would conclude something else had to be done.

Q. Was the arm badly swollen?

A. Yes, the arm was swollen.

Q. Was it painful?

A. Very painful.

Q. Now what did you do in the way of extensions, if anything?

A. There is a recognized splint that you put on for that. We put on splints that go to the elbow and hold it that way, just hold it with splints; I never heard of any one putting a weight on. We put on that kind of a splint.

Q. Were the splints you put on up against the big part of the arm?

A. Yes, sir.

Q. And then bandaged to the splint and that makes the extension?

A. Yes. Then, of course, if the arm got very painful this had to be taken down again.

Q. The arm swelled up badly?

A. Yes; very, very badly.

Q. Was there any infection?

A. We took all this down, loosened them, cut the bandage down, if I remember rightly, that would make a hole down to the wound, and we put adhesive to hold it on the outside; I think that was on Tuesday following the Saturday, or Wednesday, I am not sure of that. It looked as though it were infected by the temperature going up, and we took the whole thing down and it was infected. Of course it was not the fracture we had to deal with at that time—we had to deal with the fracture, but the fracture was secondary to the infection.

Q. Now what do you mean by that, doctor?

A. I mean that the fracture has to be dealt with to get it healed up, but that the infection which came there—it came, I do not know what the cause of it was, but that infection had to be eliminated before we could get the bone to heal.

Q. Then what did you proceed to do, so far as the infection was concerned?

A. Dressed and disinfected the parts filled with pus.

Q. How often did you dress and disinfect the wound—did you notice the infection on Wednesday, I think you said?

A. Well, think it would be not less than once a day.

Q. It would not be less than once a day?

A. No. Of course I will explain this; of course the flesh had all been bruised and it had lost its vitality and when once infection had started that had to slough, there was no vitality for that part of the arm, and it would slough and cause pus and infection.

Q. Now was it possible to reduce the fracture until you got rid of that infection?

A. Might reduce it but you could not get it to heal.

Q. What would be then a recognized method, in your profession, for treating that arm, from that time on?

A. To get it in as good a position as possible, get the bones in as good position as possible and treat the infection and get rid of the infection, apply dressings for that and also the swelling which was great.

Q. Then what treatment did you advise with reference to the treatment of the arm after that?

A. Well, this case, if you will understand, was given to me to be sent to the Marine Hospital, and the man understood that as soon as he was ready he was to go there and understood that I would not have the case there, but I told the man and wrote a letter also to the Marine Hospital authorities what I had done and that Lane splints or wiring, Lane splints applied or wiring have to be done.

Q. Either one of these methods you recognize in the practice?

A. Yes, sir.

Q. And he went from you to the hospital before the time arrived for your doing that?

A. Yes. The arm was badly infected and swollen, but his physical condition was so that he could walk to the boat; I am not sure whether I drove him down town or not, but he bought something at the dry goods store, possibly a shirt. I told him where to go. I wrapped his arm up, put the splints all over it merely as a matter of extra precautions; I put these splints and bandages on simply to keep it warm and protect it so that it could not move any until he got to Townsend. Then I wrote a letter to the doctor at Townsend advising him what I had done and what I thought ought to be done, that if he had been left in my care I would put on a Lane splint or wire the bone; that would be a matter of judgment, when the proper time would arrive to do it.

Q. Now, had the time yet arrived when you would get down to putting on splints or doing the wiring?

A. No, sir.

Q. Why not?

A. Because on account of the infection it would not heal.

Q. Did the swelling have anything to do with that?

A. Yes, the swelling would have to abate because you could not put on permanent bandage or plaster.

Q. What is the recognized method under these circumstances in your profession as to putting on a Lane plate or wiring during the time a wound is infected or swollen?

A. Not to do it.

Q. Was there any time while the patient was in your hands that the arm and wound was not too badly swollen?

A. There were times when it was worse, but even from the first day I saw him there was considerable swelling; even that morning of the 4th there was considerable swelling. It swelled after I first saw him, you understand.

Q. Then if I understand you rightly, doctor, you first put on splints for the purpose of extending the arm or bringing the ends of the bones together?

A. Yes, sir.

Q. Then, after the arm became so badly swollen and infected you had to take them down?

A. Infected and in pain, yes.

Q. Did he have any fever during this time?

A. Yes, he ran the temperature, after one or two days he had temperature.

Q. Indicating what?

A. The temperature would indicate infection.

Q. At your hospital did you have trained nurses there?

A. Yes, sir.

Q. Was this man in the hands of trained nurses when you were not there?

A. Yes, sir.

Q. And was that during all the time that he was there?

A. Yes, all the time.

Q. When did he leave your place?

A. He left on the 11th of January.

Q. He was at your place from the 4th until the morning of the 11th?

A. Yes, I think he had dinner with us on the 11th or his lunch and I took him to the boat, the boat left at one or two o'clock.

Q. He took the boat from Angeles to Townsend. How long did it take to make the run?

A. I forget which boat; we have different time cards.

Q. It would be about how many hours, do you think, ordinarily?

A. Probably three; it might have been more than three.

Q. Now, you say you bandaged the arm up when he started, when he left your hospital to go to Port Townsend?

A. Yes, sir.

Q. Was that a permanent bandage that you put on or temporary?

A. Absolutely temporary; I wrote the doctor to that effect.

Q. That was put on to protect his arm during the voyage?

A. To protect it from the cold weather that we had and to protect it from moving or displacement that would simply jar or make the contact worse.

Q. Have you ever had experience, doctor, in accidents occurring on boats?

A. Yes.

Q. Have you ever done any business for the government up there?

A. Yes; off the boat Snohomish, which is in the U. S. R. C., United States Coast Guard service, and for the Amalga, I have done emergency work for.

Q. That is cases where accidents occurred or severe sickness overtaken the United States marines or employees, that were closer to Port Angeles than they were to Port Townsend, where they needed emergency attention.

A. Yes, emergency attention. I have never handled any but just small cases where one or two calls or treatments where I kept them. Anything that was serious

or that required any extended treatment, I always send them on to Port Townsend as soon as it could be done. I had a case here this fall, a sailor of the Snohomish that had a broken arm; I set the arm, and the next day—it was not as bad a case as this—I set the arm and the next day he went to Townsend and stayed there while being treated. I did the emergency work.

Q. Now, doctor, when this man was brought to you, did the captain of the Holmes give you a permit to admit him to the Port Townsend hospital?

MR. LANDON: I object as leading.

Q. Well, I will ask you then, did the captain give you a paper of any kind?

A. When the captain came to me and brought him upstairs and asked me to fix him up, he said he was to be sent to the Marine Hospital as soon as he could go.

MR. LANDON: I object unless the witness explains that the paper was lost, for the paper would be the best evidence.

MR. HULBERT: We will get to that.

Q. What, if any, paper did the captain give you, doctor?

A. He gave me as custodian, for this sailor, a paper that was to admit him to the Marine Hospital.

Q. What did you do with that paper?

A. I put it in my desk, in a drawer I have there, and when the sailor left I gave it to him.

Q. That was Fondahn. When you say sailor, you mean Fondahn?

A. Yes, sir.

Q. You gave this paper to him?

A. I gave him the paper that he took with him.

Q. That is the one the captain gave you?

A. Yes, that the captain gave to me.

Q. Now, doctor, is it true that you asked the captain to explain to you what that paper meant?

A. Which, the permit?

Q. When the captain gave you this paper, this permit or whatever it was, did you ask the captain to explain that paper to you?

A. I did not ask him to explain, that is ridiculous to talk that way. I knew what the paper was. I did not need to ask any explanation.

Q. The reason I ask you the question is because Fondahn has already testified in the case and has stated that you asked the captain to explain the paper. Did you ever make such a statement?

A. No, sir. The paper was a permit to the hospital at Townsend. I knew what the paper was.

Q. Had you ever had any of them before?

A. I have seen them before, yes. Sailors have to have them when they go from the office.

Q. Now, Mr. Fondahn further states in his testimony that when you asked for an explanation, you said the captain said he had nothing to explain, this man is in your hands now and out of mine. Was any such statement made with reference to the explanation of the paper?

A. No, I do not think there was anything of that kind.

Q. Was there any time, doctor, that you refused or neglected to give this man treatment?

A. No, sir.

Q. Was there any time while he was there that you insisted upon him getting out and going away from your place?

A. No, sir; there was no time. He could stay as long as he liked, but I told him that he was to go to the Marine Hospital as soon as he was able to go he should go there, because that was the place provided for him; that that was his permanent place, this was only temporary arrangement—mine was just temporary.

Q. Now, when the captain came to you, I will ask you whether or not he asked you if you did marine work or not?

A. There was something to that effect. He asked me if I was a marine doctor. When I told him no, that I had done emergency marine service. He asked me if I was a marine doctor and I said no, because I am not.

Q. Now what did you tell him then—I understand that you told him you did emergency marine work?

A. That I had done before this time and have done it since, but emergency marine work.

MR. LANDON: I do not know that I am just right in this, but I think counsel is leading the witness as to what to say.

MR. HULBERT: I do not mean to, I simply repeated what I think the doctor said.

Q. Was there any other conversation about your work, or about pay, or anything else at the time?

A. I do not recollect anything else further, at all.

Q. The man was there, injured?

A. If I may explain to the Court, this was in the morning, six o'clock; there was a man sitting in my office; he was suffering awful pain; the man got up and walked and then had to lie down. I gave him something to ease his pain—morphine; the man was in very great pain; I had to get him relieved as quick as I could, and there was no bartering there.

Q. Was there any discussion about fees?

A. No; I was not in a position, having a man suffering, I was going to do that emergency work while I could. I have these cases frequently from ships and from the woods there and I never stop, I cannot stop to barter with a man about the pay. This man, you understand, had a very severe case, he was in a bad way.

Q. Did you, in treating this man, doctor, did you follow the teachings of your school in taking care of his arm?

A. Yes, sir, the teachings of the school, and further followed Scudder.

Q. Who is he?

A. He is recognized as the American authority on fractures.

MR. LANDON: I object to this as incompetent. I object to the answer of the witness that he follows some school and some doctor.

Q. Who is Scudder?

A. He is an American authority on fractures.

Q. He belongs to the same school that you do?

A. The regular school, yes.

Q. Now, what do you mean by following the teaching of your school and also Seudder?

A. Well, I was taught when I was at my medical college—

MR. LANDON: I object to the witness testifying as to following some school. I submit it is only competent to tell what he has done in the matter, when he did do.

Q. You may answer, doctor; go ahead.

A. That there are certain recognized courses of treatment of cases, and I had followed what I had seen done at my school, and what I had seen at the Polyclinic and the Mercy Hospital under Doctor Murphy.

Q. When you speak of Murphy, is that J. B. Murphy?

A. Yes, sir.

Q. What is he?

A. I take him to be the best surgeon in America.

Q. Have you had experience with him?

A. I have attended his clinics, seen him operate and heard him lecture.

Q. That was where you took one of your post graduate courses?

A. Yes, at the Mercy Hospital; I have been there frequently.

Cross-Examination.

Q. (Mr. Landon.) Now, doctor, when was the first time any one said anything to you about your being paid for your services?

A. I don't know that anybody did say anything about paying for my services.

Q. Not at all?

A. No, sir. The first reference to pay, if you wish me to tell you that, was when Fondahn was leaving; he left on Saturday. Fondahn had with him a hundred and some dollars which I deposited in the bank, and I told Fondahn that the way I did with these cases off emergency ships, not off government ships, that the captain or the man himself had always paid me, and I gave him a receipt so that he could collect it from the company or wherever he could.

Q. Nothing else said either way about it?

A. And he had the money with him, and if he would do that it would save me a lot of trouble, and he would be closer to the people than I would, and there was not a word about it and he agreed to it.

Q. The captain did not say anything about pay, at all?

A. No, sir.

Q. He gave you a permit that you knew was only good at Port Townsend?

A. He did not give me a permit as directed to me. He gave me a permit to give to Fondahn to admit him at Port Townsend hospital. That permit had absolutely nothing to do with me.

Q. He made no arrangements with you about pay for your services?

A. No, sir.

Q. The captain made no arrangements whatever?

A. Nothing whatever. The captain could not have been there at the end of the service, and as I told the man he could pay me or I would get it from the company afterwards.

Q. Now, you are as sure of that as anything else that you have testified to. You remember that the captain did not make any arrangements about pay at all.

A. Made no arrangement.

Q. The captain stayed there until when?

A. I would not be positive when the captain left; I saw him the next day a couple of times.

Q. Nothing said then at all?

A. Nothing said at all.

Q. Nothing whatever. Did you attempt to set this man's arm?

A. Attempt to set it?

Q. Yes.

A. What do you mean by attempt to set it?

Q. Did you set it?

A. I gave the man an anesthetic, put his arm in place and sewed up the muscles and put on temporary splints and told him when he came out from the anesthetic that if it healed up, all right, if not, he would have to have a Lane splint or wires applied.

Q. Did you consider that was sufficient setting of the arm?

A. I say absolutely it was. If it healed up without an infection it might have come out all right. I could

not tell beyond that. I could not say anything, nor could any man say in a case of that kind what would happen.

Q. You examined it?

A. Yes, sir.

Q. Did you notice the condition of the bone?

A. Yes, sir.

Q. Will you examine exhibit "A"?

A. Yes, I have examined that; I have not seen this before.

Q. Now, after examining that exhibit, would you say that that was a proper setting?

A. That man left me; he went to Townsend. I do not know when this picture was taken or what had happened before it was taken. Of course this is not a proper setting; it could not be. But before the swelling and sloughing out was finished, you could not set it in position.

Q. Now, doctor, when you got this man at seven o'clock, the swelling was not very severe?

A. There was considerable swelling at that time.

Q. The swelling came on afterwards, didn't it?

A. More swelling came on than at first.

Q. Now, did you take care of this case particularly yourself?

A. Did I take care of it?

Q. Yes.

A. I did take care of it; I seen the man every day.

Q. Is it not a fact that your brother and others attended to the case?

A. No, my brother attended it with me; helped me to attend to it.

Q. You stated what was done there, all that was done?

A. How do you mean stated?

Q. To the arm, during the time he was there?

A. The bandages we used?

Q. You stated what was done, everything that was done?

A. Well, if the bandages became too tight when I was not there, he might have loosened them, because of the swelling coming on.

Q. You only attended to taking care of this man temporarily?

A. I only intended to take care of him temporarily.

Q. Only intended to take care of him temporarily?

A. I just intended to give temporary treatment until he got to Townsend.

Q. They simply put him off there to get rid of him—from the boat?

MR. HULBERT: I object as calling for a conclusion.

Q. Is not that your opinion, doctor?

MR. HULBERT: I object as incompetent, immaterial and calling for a conclusion of the witness and conclusion of counsel.

MR. LANDON: The doctor has testified to a good many conclusions and conjectures.

Q. Is not that a fact that he put him ashore to get rid of him?

A. Well, I do not know that to be a fact.

Q. From the actions of the captain?

A. They took him off to get him taken care of and I suppose get rid of him, as far as that is concerned, but he made arrangements where he would have his permanent care and where he should have it.

Q. You told me that you knew well enough that they had put him off there to get rid of him?

MR. HULBERT: I object as incompetent and immaterial and not cross-examination.

MR. LANDON: I think I have a right to show what the demeanor of the captain was.

MR. HULBERT: He has already told you what he put him off there for.

Q. Have you got a memorandum as to how you attended this man? Do you keep books?

A. Yes, sir.

Q. Have you that book?

A. Possibly there will be a chart for it.

Q. Would that be in your handwriting?

A. Oh, no.

Q. Now, doctor, is it not a fact that you had some controversy with the captain?

A. No, sir, I had no controversy with the captain at all.

Q. Regarding the treatment? That you conferred with the hospital and found out, you or your brother

found out, that the permit was not good for your pay, and that you and your brother asked him to leave as soon as possible?

A. My brother had no authority to ask him; I own that hospital; my brother is only an attendant with me; I do not think he ever did. It was my case. I was responsible for it. I absolutely know he did not tell him anything of the kind. I had told him, as soon as you are ready you must go to Port Townsend, as soon as you feel you can go.

Q. Now this is what Fondahn testified to: "The captain took me up to Dr. Taylor—" Have you read this testimony?

A. No, I have not.

Q. "Taylor brothers. That I found out it was not a marine hospital. The captain wrote out a permit for me. This permit is only good to get me accepted at the marine hospital at Port Townsend. The captain says, here is a paper, doctor, to send to the Marine Hospital, and you will have to do it for him and they will square all your expenses." Now, doctor, don't you remember such a conversation?

A. No, sir; I remember him giving me a permit for Fondahn to admit him to the Marine Hospital. And, as Fondahn was not able to take care of himself, you can easily see or imagine from what I tell you, the man—

Q. I did not ask you about the condition of the man at that time; I ask you what took place between you and the captain?

A. I am trying to tell you.

Q. Well, proceed. How do you answer it, doctor?

A. I have answered it.

Q. Nothing said whatever?

A. Nothing said whatever.

Q. You did not ask the captain to explain this piece of paper?

A. No, sir, I do not think I asked him to explain it; I knew what it was.

Q. You did not ask him anything about it at all?

A. Nothing in the way of explanation. I might ask what boat he was on, something about his service, or who they were or what company they were, but to explain that paper, I did not need an explanation what that paper was.

Q. "The captain told him, I have nothing to explain, this man is in your care now, he is out of my hands." Was there anything like that said?

A. Not that I recollect.

Q. Now you would remember?

A. I would hear and recollect, if it took place.

Q. Sure?

A. Certainly.

Q. Now, then, further he testified, "The doctor came in in the morning, piled my clothes there and wanted to know if I could get up now." Do you remember about that?

A. No, sir. I never did anything like that. I did not do that.

Q. You do not know whether your brother did?

A. Well, I do not know that he did or did not. I am pretty positive he did not because he would not do that kind of thing. He had to ask me what he would do.

Q. Now, what did you say the captain asked you—if you were a marine doctor, did he?

A. He asked me if I was a marine doctor. I told him I was not. That I had done marine emergency work.

Q. What do you mean by that?

A. When there was a case happened, a case that might happen on the Snohomish, where a seaman was hurt they are supposed to send them to Townsend. But the law allows them to make out a statement that they could get me before they could get the marine doctor, if the case was absolutely necessary for them to get a doctor. And this case of Fondahn's, I saw it needed emergency treatment.

Q. It needed also permanent treatment?

A. Yes, it certainly did.

Q. Now, doctor, what led you to believe that they were trying to get rid of him?

MR. HULBERT: I object as incompetent and immaterial. Counsel is assuming that the testimony shows that such a condition existed.

MR. LANDON: Well, I want to show by this witness that he has made a statement that the captain put him off there to get rid of him, and I want to know his reasons.

MR. HULBERT: There is nothing to show that.

Q. I want to know.

(Previous question read to witness.)

A. I cannot recollect anything that led me to think that.

Q. Doctor, at Port Townsend some two weeks ago, when I called on you, did you not state, in effect, while you thought that we were trying to prove you incompetent, that you knew that they were putting him off there to get rid of him, or words to that effect?

A. I will not say that I did.

Q. Now, doctor, you would not say you did not?

A. I would not say that I made any statement to that effect.

Q. Now as a matter of fact that is what they were doing?

A. I do not know anything at all about it.

Q. You only pretended to treat him temporarily, to give him temporary treatment?

A. Temporary treatment until he was able to go to Port Townsend. But you will understand that that treatment would be the same as if I was going to treat him permanently.

Q. Would you, after examining exhibit "A", say that is the way you would treat him permanently?

A. If I knew the condition of the arm—of course you must understand that the man had gone to Townsend. The arm as shown in the picture I will swear I did not leave the bone that way. I will swear to that that

I never left that bone in that condition. You can never tell me that I would leave that that way. You understand that man had been brought over to Port Townsend from me.

Q. You do not think any good doctor would leave a bone like that?

A. Certainly not.

Q. If that bone was in that condition it had not been properly treated, had it, doctor—if it was in that condition?

A. I want you to understand that bone was not like that when it left me. The treatment would be to put it in place.

Q. What was the condition of the bone when it left you?

A. A compound fracture, but as far as we could get these bones placed together.

Q. And was it in place?

A. When it left me?

Q. Yes.

A. I would not say it was in perfect place.

Q. It was not like that (exhibit "A")?

A. No, sir.

Q. You would say it had not been good treatment if it was that way?

A. No, it could not have been good treatment. He left me with bandages on the arm. We splinted it up as much as we could to protect it while he was going to Townsend. He walked down to get on the boat.

Q. Was it unsafe to move him at that time?

A. No. If it was I would have kept him there. He was able to walk, you see.

Q. Now, you accepted thirty dollars from him at that time?

A. Yes, I gave him a receipt for it.

Q. What was said?

A. I told him what the charges of the case would be, that that was as little as I could make it, thirty dollars, and if he would pay me the thirty dollars I would give him a receipt for it and he could collect it probably much easier than I could and quicker. To which he made no objection whatever. He says I will pay you and take a receipt, and put the receipt in on the case. I did not know what he meant—probably that the company would pay it.

Re-Direct Examination.

Q. (Mr. Hulbert.) You have told counsel that you were treating the patient temporarily, as you expected him to go to Port Townsend?

A. Yes, sir.

Q. Was that treatment any different in any degree or any particular from the treatment that you would have given the man if he was going to stay with you right there?

A. Absolutely not.

Q. Now, after infection got in there, and that, I understood you to say, occurred on Wednesday—

A. I think it was on Wednesday.

Q. Then, if the bones were not in perfect apposition, would it not be necessary to clean up the infection before you could get down and do anything in the way of wiring?

MR. LANDON: I object to counsel leading the witness.

A. It would be necessary then, where the arm became infected to get rid of the infection. In fact, in the meantime that was the whole thing to do, to get rid of the infection that we had in the arm, because the bone would not heal.

Q. Then, if the bones were not in perfect apposition, was there anything you could do with the bones until you could clear the wound of infection?

A. We could put on wires or Lane splints—

Q. Before you cleaned up the infection?

A. No, sir. If I may explain that—

Q. Certainly.

A. We could not put on wire or Lane splints with the surrounding tissues infected. You would have to bore a hole in the bone, and after that the infection would be apt to get in the bone, and you would have a bigger and wider field for that infection.

Q. And if you got infection in the bone, that would probably be followed with necrosis or some disease of the bone?

A. If that bone became infected he might lose the arm.

Q. One more question. Whatever might have been the circumstances of a man coming there, or whatever

may have been said at the time that he was left with you, or whether or not arrangements were made regarding your fees, did that make any difference with your treatment of this man?

MR. LANDON: I object as calling for a conclusion and leading.

A. No, sir. Whether I were paid or not, my treatment would be the same. Because, if you will let me explain further, you get emergency cases and you do not know whether you will ever get paid. Whether from the boats or street or woods, we treat them all the same, the best treatment.

Q. Now, was there anything omitted in the treatment of this man that you would have given him if there had been any different arrangements made at the time that he was left there?

A. No, sir.

A. No, sir.

MR. LANDON: I object as leading and improper and calling for a conclusion of the witness.

Q. You stated in answer to counsel's question, that you knew and that Mr. Fondahn knew, that as soon as he was able we would go to Port Townsend?

A. Yes, sir.

MR. LANDON: I object to that as leading.

Q. Now, did the fact that you knew that he was going to the Marine Hospital, and that Mr. Fondahn knew that we was going there as soon as he was able, affect your treatment of the man in any way?

A. No, sir.

Q. (Mr. Landon.) Do you do a great deal of work for nothing?

A. I certainly do some that I cannot collect for.

Q. That you don't intend to collect for; that you don't intend to get pay for?

A. No. Excepting the contract that I have with the county. There are people in Port Angeles that I will do work for and I know I will not get paid for it.

Q. Strangers?

A. Do I do that work? For strangers?

Q. Yes.

A. Well, I hope I will get paid. I usually try to collect my money.

Q. Now, if a man gets in your hospital and you find out that you are not going to be paid, as Mr. Fondahn testified in this case, what do you do then?

A. When I find out I am not going to get paid?

Q. Would you give him the same treatment then?

A. Certainly I would.

Q. You would go ahead and give him the same treatment?

A. Go ahead and give him the best treatment possible.

Q. Even though he could go to Port Townsend and get it there.

A. Even though he could go there; that would be up to the man and me to get him there as soon as we could.

Q. That is what you done in this case?

A. As soon as he was able to go, he went as soon as he was able to go to Port Townsend.

Q. Who suggested that?

A. That he go to Port Townsend? That I could not tell you. I asked more than once, I said, as soon as you are able to go to Port Townsend, you are to go.

(Testimony of witness closed.)

Further hearing adjourned. To be resumed by agreement.

Seattle, Washington, April 22, 1915.

PRESENT:

Mr. Landon, for the Libelant.

Mr. Hulbert, for the Claimant.

DR. WILLIAM H. TAYLOR, a witness called on behalf of the Claimant, being duly sworn, testified as follows:

Q. (Mr. Hulbert.) What is your business, doctor?

A. Physician and surgeon.

Q. How long have you practiced your profession in the state of Washington?

A. Five years.

Q. Have you been admitted or licensed to practice in this state?

Yes, sir.

Q. Are you graduated from any medical college or school?

A. Yes.

Q. What college?

A. London, Ontario, Canada.

Q. When did you graduate from that school?

A. 1910.

Q. Where have you practiced since that time?

A. I served internship at Tacoma; been one year at Blaine, Washington, and the rest of the time at Port Angeles.

Q. Have you taken a post graduate course yet?

A. No, sir.

Q. Where are you practicing now?

A. Port Angeles.

Q. How long have you been practicing there?

A. Three years.

Q. Are you a brother of W. J. Taylor, who has already testified in this case?

A. Yes, sir.

Q. Are you associated with him at Port Angeles?

A. Yes, sir.

Q. And since you have been there, have you been actively engaged all the time in the general practice of medicine and surgery?

A. Yes, sir.

Q. What connection has your brother, or yourself, with a hospital in Port Angeles?

A. My brother owns a hospital in Port Angeles.

Q. What is the name of that hospital?

A. The Olympic.

Q. Is your hospital equipped to take care of any kind of surgical cases or sickness?

A. Fully equipped for either medical or surgical cases.

Q. Have you operating room?

A. Yes, fully equipped operating room.

Q. Do you know, Mr. Fondahn, the libelant in this case?

A. Yes, sir.

Q. Now, when was the first time you ever saw him?

A. I do not remember the exact date; it was January, 1913.

Q. And where did you first see him?

A. At the hospital.

Q. What condition was he in at that time?

A. He was brought in with a compound fracture—I do not remember which arm it was?

Q. The right arm?

A. It was a compound fracture of the arm below the elbow. He was suffering from shock at that time.

Q. Now, what was done with him at the hospital?

A. He was taken to the surgery and given an anesthetic. There was a splint and dressings, if I remember right, and that was taken off and revealed a wound of the forearm, a circular wound, about one and a half or two inches in diameter, through which both bones were protruding, and it showed a very ragged wound, the muscles were torn and the periosteum torn back from the bones, a very ugly looking wound. The arm was washed with antiseptic soap and solutions, and the pieces of cloth and one thing or other that had worked into the wound were picked out and the wound bathed with iodine; the bones put back in position and dressings applied, splints applied and put back to bed.

Q. Now, what was the nature of the splints applied?

A. The usual splints, both kinds, anterior—what we call an angular splint, it comes down this way, from the upper part of the arm and comes down here, and is tied up here and gives a pull, an extension to the arm.

Q. Do you know whether there was an particular name for that method?

A. It is just called anterior right-angular splints.

Q. In use by the profession?

A. In use by the profession for that kind of injury.

Q. You put the bones in proper position, did you?

A. Yes, the wound was open and they were put back in proper place, you could see them.

Q. And then, what, if anything, was done? Was there anything done with the muscles?

A. The muscles were torn and were all sewed up and the membranes.

Q. Did they make a covering over the bone?

A. Yes, sir.

Q. And then you say he was put back to bed?

A. Yes, sir.

Q. What care did he have when you put him to bed, what attention or care did he have after that time?

A. Well, he had the usual care passing the anesthetic, a nurse had to stay with him two or three hours, until he came out from the anesthetic, to see that he kept the arm still and see that he was all right. After that he was visited once or twice a day.

Q. By the doctor?

A. Yes, sir.

Q. How were you equipped there as far as nurses were concerned to take proper care of patients?

A. Trained nurses.

Q. Were there trained nurses around Fondahn during his stay in the hospital?

A. All the time, yes, sir.

Q. Did any infection set up after that in this wound?

A. Yes, sir.

Q. Can you tell just how long that was?

A. I do not remember definitely, no. I remember it was two or three days after that his temperature went up, which would indicate an infection.

Q. Then what was done, if you know?

A. Why, the splints were taken down and the wound cleaned up, sterile dressing applied twice a day, if I remember.

Q. Sterile dressing applied to the wound?

A. Yes, sir.

Q. Applied to the wound twice a day?

A. Yes, sir.

Q. Did you assist in doing that work, doctor?

A. Yes.

Q. Who else was present, if you remember, when he was dressed and taken care of that way?

A. Mrs. Taylor, my wife, and Miss Peterson, I think was the other nurse.

Q. Do you remember the date that Mr. Fondahn

went from your place, from the Olympic Hospital at Port Angeles, to Port Townsend?

A. No, sir. I think it was about six days. I am not sure.

Q. Now, just what were you doing to get rid of the infection after it developed?

A. Washed out the pus with antiseptic solutions, then put back on the sterile dressings, hospital dressings.

Q. Was the arm swollen?

A. Yes, very badly swollen.

Q. What was the condition of it when you first saw it, as to whether it was swollen or not?

A. It was swollen at that time.

Q. Now, what was the essentially important thing to do after infection was discovered in the wound?

A. To take care of the infection.

Q. What was the most important thing to look after then?

A. To get rid of the infection.

Q. I think you stated, doctor, the condition that the bone was in and the muscles about the wound and about the bone. I would like to have you explain a little further and more particularly about that. Was it a clear, clean break, where the bones stuck out through the flesh, or was it a bruise?

A. No, sir, it was a very ragged break, more kind of a jammed appearance, the edges were.

Q. Did they have the appearance of being broken the same as if you would take a pencil and break it, or did it have the appearance of being struck with something?

A. Had the appearance of having been struck.

Q. Would that make any difference in the probabilities of perfect union of the bones?

A. Yes, a clear cut break will heal up much quicker than a jagged break.

Q. What was there that would ordinarily prevent or interfere with the union of the bones?

A. The periosteum, that is the lining on top of the bone, was torn back, and left the bare end of the bone.

Q. After the infection got in there, what do you think, doctor, in your judgment, was necessary to get a union of the bones?

A. It was absolutely necessary to clear up the infection first.

Q. Then what do you think would have been the next?

A. Well, have to have some operative treatment, wiring of plating, something like that.

Q. Who had charge of this case there, really had charge of it, during the time he was in the hospital?

A. My brother, Dr. W. J. Taylor.

Q. Whatever you did, you did as assistant?

A. Yes, sir.

Q. Did Mr. Fondahn leave the hospital before the infection was cleared up?

A. No, the infection was still on when he left, I think.

Q. Were you present at all when the captain and your brother, W. J. Taylor, first met with reference to Mr. Fondahn's treatment?

A. No, sir.

Q. You did not hear anything said then about the permit?

A. No, sir.

Q. Or about fees or anything of that kind?

A. No, sir.

Q. Were you present when Mr. Fondahn made any payment to your brother?

A. No, sir.

Q. Now, doctor, you have related the character of treatment that was given in this case. I will ask you whether or not that is the kind of treatment that is taught in the schools of your profession?

A. Yes, sir.

Q. And the method that you pursued from the time that he came to your place until he left there, was that method the same method of treatment that is taught in your schools in your profession?

A. Yes, sir.

Q. Is there anything now that you think of that could have been done for him that was not done?

A. No, sir, not a thing.

Cross-Examination.

Q. (Mr. Landon). How far is your hospital located from the town of Port Angeles?

A. It is right in the city, part of Port Angeles.

Q. How far was it from the landing at the wharf?

A. Oh, I should judge it was about a mile.

Q. Possibly a mile and a half, is it not?

A. Well, it is a mile, anyway.

Q. It is a house that has been turned into a hospital?

A. It is a large dwelling house, yes, sir.

Q. How old are you?

A. I am 26.

Q. Fondahn was there how long?

A. I am not sure. It was six or seven days.

Q. Now you have an office down town?

A. Yes.

Q. It is near the water front? In other words, your hospital and your office are something over a mile apart?

A. Yes.

Q. Now, when was the first time that you saw Fondahn?

A. That morning he was hurt.

Q. Where?

A. At the hospital.

Q. How was he brought up?

A. I do not remember.

Q. Do not you remember bringing him up with a team yourself?

A. No, sir, I do not. I think my brother brought him up, if I remember.

Q. You have a team, a spring wagon, have you?

A. No, sir.

Q. What conveyance have you?

A. We have automobiles.

Q. Haven't you got a horse and buggy?

A. We used to have, at that time.

Q. We are talking about that time, doctor. Now, what time of day was this?

A. I should judge it was about between seven and eight in the morning when I saw him.

Q. What time did you usually go down to the office, you or your brother?

A. Oh, at that time my brother was living down town; he was at the office all the time.

Q. Living in the office?

A. Yes, sir.

Q. Rooming in the office?

A. Yes, sir.

Q. So that he was not staying at the hospital?

A. No, sir.

Q. What are your charges there, regular charges, doctor?

A. My brother looks after the business end of it. It is his hospital.

Q. You do not know?

A. No.

Q. Don't you know what you would charge for setting an arm?

A. Well, I know what I would charge myself.

Q. What would that be, doctor?

MR. HULBERT: I object as incompetent and immaterial.

A. Personally, I would charge a hundred dollars in a case of that kind.

Q. Now how much do you charge for the nursing in a case like this; how much would you charge for nursing him?

A. The nursing was included in the hospital.

Q. How much is your hospital fee, doctor?

A. I charge about fifteen dollars a week.

Q. That includes board?

A. Yes, sir.

Q. And nursing, does it?

A. Yes, sir.

Q. And room?

A. Yes, sir.

Q. And does that include the operating room, too?

A. No, sir.

Q. What would be the operating room charge, doctor?

A. Ten dollars for the operating room.

Q. That would be for the operating room.

A. And five dollars for the anesthetic.

Q. That would be thirty dollars?

A. Yes, sir.

Q. And he was there eight days?

A. I do not know how long he was there. I do not remember.

Q. Did you see that permit, doctor?

A. No, sir.

Q. Did you hear anything about it at all?

A. No, sir.

Q. Did you speak to Fondahn after he had been there a couple of days regarding him going to Port Townsend?

A. No, sir, I do not think so.

Q. You do not?

A. No, sir, I spoke to the man most every day.

Q. Did you go to him and ask him to go to Port Townsend?

A. No, sir.

Q. Doctor, as a matter of fact, you did not dress this arm at all after you got him there?

A. Yes, his arm was dressed every day.

Q. His arm was dressed every day?

A. Yes, sir.

Q. Now what was the occasion of his leaving, if you know?

A. Why, he left because he was going to the hospital at Port Townsend, of course.

Q. Did you say anything to him about leaving?

A. No, sir, I never said a word.

Q. You are sure you never said anything to him about that?

A. I never said a word. It is none of my business where he went.

Q. You do not remember going down and getting him that morning and bringing him up?

A. No, sir, I did not.

Q. You stayed at the hospital all the time?

A. I lived at the hospital.

Q. And your brother lived down town?

A. My brother lived down town at that time, yes.

Q. Did he take care of the office work?

A. Well, I had an office down town, too.

(Witness excused.)

MRS. LOUISE TAYLOR, a witness called on behalf of the Claimant, being duly sworn, testified as follows:

Q. (Mr. Hulbert). Where do you reside, Mrs. Taylor?

A. Port Angeles.

Q. You are the wife of Dr. Taylor, who just testified?

A. Yes, sir.

Q. And what, if any, profession have you?

A. I was a trained nurse.

Q. How much experience have you had in that work?

A. About eight years.

Q. Are you a graduate of any school?

A. The Chicago Polyclinic.

Q. When?

A. 1906.

Q. And how long have you lived at Port Angeles?

A. Three years.

Q. What, if any, connection have you had with the Olympic Hospital at Port Angeles?

A. I was head nurse.

Q. How long did you occupy that position.

A. A year and a half.

Q. Were you there in January, 1913, when Fondahn was there?

A. Yes, sir.

Q. Do you remember how many nurses there were?

A. We had two.

Q. And do you remember the occasion of Mr. Fondahn coming to the hospital, Mrs. Taylor?

A. I do.

Q. Were you present when he was taken to the operating room?

A. Yes, sir.

Q. Now, if you will just tell us what was done, as near as you can?

A. In the surgery, or before?

Q. From the time you first saw him until the time he was operated on?

A. He was brought from down town and put into a ward and a trained nurse gave him a bath before he was taken to the surgery, because he was very dirty, and he had a night gown put on him and was taken to the surgery, and I administered the anesthetic.

Q. Who else was present?

A. Oh, the other nurse, Miss Peterson, and two doctors.

Q. Your husband and Dr. W. J. Taylor?

A. Dr. W. J. Taylor.

Q. Now, just what was done?

A. Well, the wound was washed with antiseptics and iodine was put into the wound, and the bones, the fracture was set and the muscles were sewn, sterile dressing put on and then the splints.

Q. Can you describe these splints, Mrs. Taylor, to us?

A. Well, it had an inner splint on the inside of the arm above the elbow, and then two splints below the elbow, running from the elbow to the wrist; then he had another splint on the bottom of his hand to hold his fingers out.

Q. Now was this splint above, did it come back against the——

A. The inner part of the arm.

Q. Back against the inner part of the arm?

A. Yes, sir.

Q. Now do you know what is called extension splints in that kind of treatment?

A. Yes, sir.

Q. Were these the usual kind that were used?

A. Yes, sir.

Q. Then what, if any, bandages were put on?

A. Well, just cotton and bandages to hold the splints in place.

Q. For the purpose of holding the arm in place?

A. Yes, sir.

Q. Now then, what was done?

A. He was taken down stairs and put to bed.

Q. And what care did he receive after that time?

A. He had the ordinary nurse, the care of a ward patient.

Q. And what attention did the doctors give him?

A. Well, they dressed him every day after his temperature started, after they had left him alone for two

days, then his temperature came up and then unbound the arm and dressed it from that time on.

Q. Was the infection then in the arm?

A. Yes, sir.

Q. And did you, as head nurse, see him there every day?

A. Yes, sir.

Q. And were you present during the time that his arm was dressed?

A. Not always; the other nurse sometimes assisted with the dressing.

Q. And do you remember how long he was treated that was before he went to Port Townsend?

A. I think three or four days.

Q. And he was still infected when he went to Port Townsend?

A. Yes, sir.

Q. How many different hospitals did you work in, nurse in, Mrs. Taylor?

A. I spent a year and a half in my uncle's hospital in Arkansas; I spent a year at the Tacoma General as assistant head nurse, and gave the anesthetics.

Q. The treatment that this man received was the same kind of treatment that is ordinarily given in hospitals?

A. Yes, sir.

Q. Is your hospital equipped so that you could give proper treatment, in your opinion?

A. It is.

Cross-Examination.

Q. (Mr. Landon). Did you see him the day he went to Port Townsend?

A. I did.

Q. Did you see how he was bandaged that day, how his arm was?

A. I do not just remember.

Q. You gave the anesthetic in this case.

A. Yes, sir.

Q. That is part of your duty, is it?

A. Yes, sir.

Q. How many nurses did you have there at that time?

A. Two.

Q. Besides yourself?

A. No, myself included.

(Witness excused.)

Hearing adjourned.

Seattle, Washington, June 9, 1913.

PRESENT:

Mr. Landon, for the Libelant.

Mr. Hulbert, for the Claimant.

Libelant's Rebuttal Continued.

GUST FONDAHN, on the stand for further direct examination in rebuttal:

Q. (Mr. Landon). You may state what, if any, treatment you received during the time you were in the hospital at Port Angeles?

MR. HULBERT: I object on the ground that it has been gone into in the case in chief and is not rebuttal.

Q. I will ask a more specific question. State whether or not Mrs. Taylor, the head nurse at the hospital, treated you?

A. I only seen her about one minute all the time I was in the hospital, that was when I was chloroformed; she was the woman that chloroformed me, and after that she never was in the room with me, not one minute.

Q. State whether or not bandages were taken off from your arm?

A. There was nothing touched my arm, no splints and no bandage during the time I was in the hospital; I never seen my arm before I came to the marine hospital.

Q. From the time you went under the operation?

A. From the time I left the ship.

Q. You never saw your arm?

A. I never saw my arm until I came to the marine hospital.

Q. Was it bandaged at the time you were under chloroform—was it bandaged when you came out of the chloroform?

A. Two splints and two bandages on it, one on top of the other; that is the way it was during all of the time.

Q. State whether or not at the time you were in the hospital there, whether any of the doctors examined your arm or doctored it in any way?

A. None of the doctors touched my arm during the time I was there.

Q. Did any one?

A. No, nobody.

Q. Who was the nurse there or party in your ward—you were down below, were you?

A. There was one nurse in our room, supposed to attend to us, but she had the whole hospital to attend to.

MR. HULBERT: I object to that as an expression of opinion of the witness, and wholly incompetent and immaterial.

Q. Was she in your room some of the time?

A. She was in there occasionally; she never stayed in there any time.

Q. Was this down stairs where you were?

A. Downstairs in the room; two men in the room, me and Mr. McDonald, an old man.

Q. What became of him, do you know?

MR. HULBERT: I object as incompetent and immaterial.

A. He died.

Q. When did he die?

MR. HULBERT: I object as incompetent and immaterial.

A. Twelve months ago, I was told.

Q. And this other nurse that you speak about, not Dr. Taylor's wife, but the one that was in the room there, did she do the scrubbing and looking after all that?

A. Sweeping and fixing up.

Q. Do you know where she is at the present time?

A. No, I don't know where she is.

Q. Did you try to find out where she is?

A. I have been trying all over to find her; I tried to find her from Port Angeles but could not find her.

Q. When you left the hospital how did you go down to the boat?

MR. HULBERT: I object to that as being not rebuttal; it was gone into in chief and is wholly incompetent.

A. I walked down.

Q. Now then, what did you do after you got on the boat?

A. I had to stand up all the time; I could not sit down without hurting my arm.

Q. State whether or not you were careful from the time you left the hospital until you got to Port Townsend Hospital.

MR. HULBERT: I object to this line of testimony because it was gone into in the examination in chief, and is not rebuttal in any sense, and therefore it is incompetent.

MR. LANDON: I think I am entitled to show what he did.

A. I had my arm in splints, bandaged and in a sling; had a sling on my shoulder, a big wide towel; the arm was lying in the towel right along and I could not hurt it any way.

Q. Anything happen at all to it?

A. Nothing happened at all to it.

Q. When you were up here at the hearing, when Dr. Taylor and his wife testified, did you have an X-ray taken of your arm on that date?

A. Yes, sir.

Q. Who did you have it taken by?

A. Dr. Kingsley.

Q. Is this photograph which has been marked identification "D," the picture that was taken at that time?

A. This is supposed to be my arm, yes.

MR. LANDON: I offer this identification as evidence.

MR. HULBERT: I object to it as being incompetent and immaterial, but do not object to it on the ground that it is not shown that it is an X-ray of the libelant's arm.

Photograph marked libelant's exhibit "D" filed and returned herewith.

(No cross-examination.)

Testimony Closed.

United States of America, Western District of Washington, Northern Division—ss.

I, A. C. Bowman, a commissioner of the United States District Court for the Western District of Washington, residing at Seattle, in said district, do hereby certify that:

The foregoing transcript from page 1 to page 118, both inclusive, contains all of the oral testimony offered by the parties before me.

The several witnesses, before examination, were duly sworn to testify the truth, the whole truth and nothing but the truth.

I reduced the testimony of the witnesses to writing in short-hand and thereafter caused the same to be type-written, and I certify that the testimony herein contained is the testimony given by the several witnesses therein named.

Proctors for the parties waived the reading and signing of the testimony given by the witnesses, agreeing that when certified and returned into court by me that it should have the same force and effect as if so read and signed.

The several exhibits referred to in the testimony and index are returned herewith.

I further certify that I am not of counsel nor in any way interested in the result of this proceeding.

Witness my hand and official seal this 9th day of June, 1915.

U. S. Commissioner.

COMMISSIONER'S TAXABLE COSTS.

Libellant—

Hearings Oct. 23-28, 1913; March 30, June 9, 1915 -----	\$12.00
Administering oaths to three witnesses-----	.30
Marking and filing four exhibits-----	.40
Transcripts, 168 folios at 10c -----	16.80
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	\$29.50

Claimant—

Hearings Oct. 23, 1913; April 12-22, 1915----	\$ 9.00
Administering oaths to four witnesses-----	.40
Transcript 198 folios at 10c-----	19.80
	<hr/>
	\$29.20

Indorsed: Testimony. Filed in the United States District Court, Western District of Washington, Northern Division, June 15, 1915. Frank L. Crosby, Clerk. By E. N. Lakin, Deputy.

No. 2539.

GUST FONDAHN vs. "C. S| HOLMES."

SUPPLEMENTAL TESTIMONY.

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*In the District Court of the United States for the Western
District of Washington, Northern Division.*

GUST FONDAHN,

Libelant,

vs

Schooner "C. S. Holmes," etc.,

Respondent.

No. 2539.

To the Honorable Judges of the Above Entitled Court:

Pursuant to the order of reference herein, permitting further testimony to be taken in said cause, and on this 31st day of August, 1915, the libelant appeared in person and by Mr. Daniel Landon, his proctor, and the claimant appeared by Mr. Hulbert, of Ballinger, Battle, Hulbert & Shorts, its proctors; thereupon the following testimony was offered:

CLAIMANT'S FURTHER TESTIMONY.

DR. W. J. TAYLOR, recalled on behalf of the Claimant, testified as follows:

Q. (Mr. Hulbert). Dr. Taylor, you have already testified in this case. Since the testimony was closed the libelant has offered in evidence a letter purporting to have been written by you on January 10th, 1913, to the Marine Hospital at Port Townsend, when you sent Fondahn from your place to Port Townsend, as you have testified before. And the Court permits you to make explanation and offer further testimony in regard to this letter. I have a few questions I want to ask you about

it. First, I will ask you to examine this paper and see if it is a copy of the letter that you wrote?

A. Yes, sir, I think that is the letter that I wrote.

MR. HULBERT: The copy I show him, Mr. Landon, is the copy you furnished me.

MR. LANDON: The original is on file with the clerk. We might have it copied in the record.

MR. HULBERT: I will admit this is a copy of the one you have certified.

(Following is the letter shown witness.)

“Port Angeles, Wash., Jan. 10th, 1913.

“Surgeon-in-Charge, Marine Hospital, Port Townsend,
Wash.:

“Dear Sir: The bearer is from the S. S. Holmes and was injured while at work on that boat and left off at Port Angeles and came under our care. He has an application blank for the Marine Hospital which we are inclosing. As we have no arrangement for this class we are sending him to you as soon as it is possible to move him. As we occasionally have patients from the different boats we would be glad to know if any arrangements could be made whereby we could treat them or administer first aid. If you would send us the information regarding this matter we would be grateful.

“In regard to patient we are sending he has a compound fracture of right arm below the elbow of both radius and ulna. We took an X-ray plate of it and by what that showed it would seem that it could not be got into position without plating. Hoping to hear from you

in regard to the case and in reference to acting in conjunction with the Marine Hospital Service,

“We remain yours fraternally,

“OLYMPIC HOSPITAL.

(Signed)

“Per J. W. Taylor.”

Q. Did you keep a copy of this letter in your files when you wrote it?

A. No, I don't think I have a copy.

Q. This, then, is a copy of the letter that you did write, in your judgment, to the Marine Hospital at Port Townsend when Mr. Fondahn went from your place to the Marine Hospital?

A. Yes, sir.

Q. You state in the letter, “The bearer is from the S. S. Holmes and was injured while at work on that boat and left off at Port Angeles and came under our care. He has an application blank for the Marine Hospital which we are enclosing.” Now, the application blank which you mention there, I will ask you if that is, or is not, the marine application—that is, the application to enter the Marine Hospital, that the captain of the vessel gave you, as you testified before in the case?

A. Yes, sir.

Q. You further state as follows: “As we have no arrangement for this class we are sending him to you as soon as it is possible to move him.” I will call your attention particularly to that part where you say “We have no arrangement for this class.” Explain what you mean by that?

A. We had with the Snohomish, we had a verbal agreement with the captain of the boat.

Q. That is a United States boat, is it?

A. That is a United States boat, to do their emergency work. I had gotten a number of other cases on merchant vessels, and did emergency work—just called to see sick men, or an accident, as I recall it now, and the boats paid me. And the arrangement that we would have would be for the government to pay us, for the Snohomish or any other boat that would take its place.

Q. As I understand you, then your idea was to have an arrangement with the government for merchant boats, the same as you had with government boats?

A. Yes, sir.

Q. I will ask you whether or not the government has contracts with private practitioners around at different places, at different ports, outside of Port Townsend?

A. Yes, sir, they have.

Q. I will ask you whether or not you have been trying and have since tried to get such a contract with the government?

A. Yes, I had been trying and had tried after this time. And tried to such an extent that the government issued papers asking for contracts and for us to give bids, and they awarded a contract the first of July of this year.

Q. To whom?

A. They were not awarded to me, but to another doctor. My contract was much higher. I think it was

through me that it was brought about, my dealing with the matter in starting it, and in this letter. And after that I wrote one to Captain Woolf of the Snohomish, and he told me about the merchant vessels, and had me write asking for a contract on the matter and the letter was attached, and then they sent out these papers, of course, to all the doctors, or many of them there. Three of them I know had letters sent them asking them to bid on the work, the same as I did. And I did bid, but I did not get it on account of my price.

Q. Now, where you say "As we have no arrangement for this class," did you mean to intimate by that that you had no arrangements for the taking care of Mr. Fondahn?

A. What I meant by that was, arrangements for merchant vessels; with the government I had arrangements with the captain.

Q. Now, "As we occasionally have patients from the different boats we would be glad to know if any arrangements could be made whereby we could treat them or administer first aid." Now, what did you mean by that?

A. Well, I meant, then treat them and do whatever work was necessary, that is, treat them altogether, if the government gave us a contract, and probably act in conjunction with the Marine Hospital as a branch. I don't know what they would term it.

Q. Further you state, "If you would send us the information regarding this matter we would be grateful." I will ask you whether that was intended by you, and was a general discussion regarding cases generally coming

off from merchant boats, without regard to this particular case?

A. It had no regard to the particular case. It was a general statement, so that, as I thought at the time, it would bring the matter, as it since happened, that they would offer a contract. I thought at the time that we could get a contract for it, and bid as we had done.

Q. As they have in other ports?

A. Yes, sir.

Q. Now, in another paragraph you state the following: "In regard to patient we are sending he has a compound fracture of right arm below the elbow of both radius and ulna." I think you have already testified to that?

A. Yes, sir.

Q. As to the extent of the injury. Further you state: "We took an X-ray plate of it and by what that showed it would seem that it could not be got into position without plating." Did you make an X-ray examination of the arm, doctor?

A. Yes, sir, before he left for Port Townsend, we did, we took an X-ray of the arm.

Q. Do you remember about when that was taken?

A. I cannot say just the exact date of that; it was some time before he left me, about a day or two days before he left; I could not be absolutely definite.

Q. Did you take an X-ray in the first instance when he first came, when you first set the bones?

A. When he first came?

Q. Yes.

A. No, there was no X-ray taken. We saw the bones were broken then without that. It was taken afterwards to see how the position was, or how it would set, and the condition it was in at that time.

Q. When he first came, as I remember your testimony, the bones were sticking out?

A. Yes, sir.

Q. And after sterilizing with antiseptics you placed the bones back into position with your fingers?

A. Yes, sir, the bones in the condition they were could be placed and laid together, with him under an anesthetic, you could do as you wished with the bones and place them any way you liked, and if we could have kept them wrapped up I think they would have stayed there. We took the bones and laid them together.

Q. Now doctor, you received my letter, did you, asking you to make further search for this X-ray plate?

A. Yes, sir.

Q. I will ask you whether or not you told me, in the first instance, that you had taken an X-ray plate and were unable to find it, before you even testified—that I requested you to make a thorough search for the X-ray?

A. Yes, sir.

Q. Did you try to find this X-ray?

A. I did try to find it. I think we took the X-ray on a glass plate and had it developed in that way, but did not have a photographer take it off, as you can understand.

Q. Did not have it developed?

A. Did not have it developed on cardboard. We took it on a glass plate, and I think it was disposed of. We had a number of X-ray plates that had faded out, and I feel that that was among them that we did not keep.

Q. What would have been done if there had been—what would have been done with it?

A. With what?

Q. You said you had a number of plates that faded, and I think you started to say that you had done something with them.

A. They were disposed of some place. We have a man in the hospital that took them away probably; we have a big box there where we dispose of them, and I suppose he carried them away and put them in the gulch or some place.

Q. Threw them away?

A. Threw them away.

Q. Who operates the X-ray machine at your hospital?

A. Either one of us does it, but my brother does most of that work.

Q. Do you remember which one of you did this?

A. I think my brother did the work.

Q. Were you present?

A. At the X-ray?

Q. Yes.

A. I cannot tell you definitely whether I was or not. I know I saw the plate that was taken afterwards, but I do not recollect being present. I cannot absolutely place

it but I know the picture was taken and I think he took it.

Q. And you have a man there who takes care of those things and looks after them?

A. We have a man clean up around, clean up the place, man to do general work around.

Q. Now what do you mean, doctor, when you say in your letter that in your opinion it could not be gotten into position without plating? What do you mean by that plating?

A. That it could not be got to unite into position unless it was held with plates.

Q. Why?

A. Because through the action of the muscles, and having to open up the arm each time it was done, there would be movement of the bones, separating them, both bones; there was no support, one bone for the other. But the plates would have been put on, in my judgment, when the infection held up, got the arm healed up, they would cut down and put on plates. We had the bones together; we set them together ourselves, and then we tied them up, and we took an X-ray and they were misplaced, and to get them together to unite, in my opinion, they needed wiring or a Lane's plate.

Q. Now, could that be done before the wound had healed up and the infection was cleared up?

A. No. It would not be done. It could be done, but of course that would be bad surgery to do that. Because then you would probably get the bone infected, as there

was considerable damage around the arm. The thing was to get it healed up and get the infection all out of it before that were attempted.

Q. I will ask you whether or not that was what you meant when you stated that it could not be gotten into position without plating?

A. Yes, that is what I meant; it could not be got to unite in position without plating. They could put it in position all right. You could give an anesthetic and cut down to the bones and put them right together, but we had no way of keeping them there then.

Q. What, if anything, was the condition that would retard or prevent the proper union of these bones?

A. The infection and the damaged tissue. The damaged tissue first, that was as soon as the accident happened the tissue was damaged. Later on infection took place.

Q. What about the periosteum, this covering to the bone, is that what you mean?

A. Both that and the muscles. Of course the damage to the muscles would heal up, but the periosteum is a factor in the healing of the bone.

Q. You further state, "Hope to hear from you in regard to the case and in reference to acting in conjunction with the marine hospital service. We remain yours fraternally, Olympic Hospital, per W. J. Taylor." Did you hear afterwards from the case?

A. Never heard a word from them.

Q. You did hear something further about acting in conjunction with the Marine Hospital?

A. Not from the Marine Hospital there. We took that up through I think it was Washington. I wrote a letter on to them. But we never had a word from the Marine Hospital in Port Townsend. I never received a letter from them in my life. Did I ask about the case?

Q. You said, "Hoping to hear from you in regard to the case and in reference to acting," etc.
to have known how it got along, how they managed, or what they did, and all about the case afterwards, just having had that connection with it.

A. I presume, having started the case, I would like

Cross-Examination.

Q. (Mr. Landon). Doctor, when was this letter written?

A. The date will be on it.

Q. That was the correct date, the date you wrote the letter? You wrote the letter yourself?

A. Yes, sir.

Q. He left on January 11th, didn't he? Evidently you wrote this letter the day before he left, didn't you, doctor?

A. Whatever the date is there. I cannot tell you when I wrote the letter. I presume the date shows when it was written.

Q. Doctor, was the X-ray taken about four days after you first treated him, do you remember?

A. I would not tell you exactly the date. I presume about that time.

Q. That X-ray was taken with the splints and bandages on, the same as they were after the first treatment, do you remember?

A. That I do not recollect. It was just taken so we would get a picture of it.

Q. (Mr. Hulbert). Was the X-ray taken before or after the infection developed?

A. I would say after.

Q. I think your testimony shows that on Tuesday or Wednesday the infection appeared?

A. Yes.

Q. And I think your testimony already shows that as soon as the infection did appear you took down the bandages?

A. Yes, we took down the bandages.

(Witness excused.)

GUST FONDAHN, libelant, recalled, testified in his own behalf as follows:

Q. (Mr. Landon). Do you remember this X-ray being taken?

A. Yes, it was taken on Thursday.

Q. You arrived on a Saturday and it was taken on Thursday?

A. Yes.

Q. Was the bandage on or off your arm at that time?

A. The bandages and splints and everything was on my arm.

Q. The same as they were first, or not?

A. The same as when I came out from under the chloroform.

Q. Had the bandages been taken off at any time?

A. No, not while in the hospital.

Cross-Examination.

Q. (Mr. Hulbert). You had infection in your arm at that time, didn't you?

A. I don't know anything about it.

Q. (Mr. Landon). Did they ever say anything about infection or treat you in any way for infection?

A. No, no temperature was taken.

MR. HULBERT: That has all been gone into before.

(Witness excused.)

Testimony Closed.

United States of America, Western District of Washington, Northern Division—ss.

I, A. C. Bowman, a commissioner of the United States District Court for the Western District of Washington, residing at Seattle, in said district, do hereby certify that:

The foregoing transcript, from page 1 to page 12, both inclusive, contains all of the testimony offered by the parties under the order of reference herein.

The witnesses, before testifying, were duly sworn

to testify to the truth, the whole truth, and nothing but the truth.

I reduced the testimony to writing in short-hand and thereafter caused the same to be typewritten, and I certify that it is the testimony given by the witnesses in said cause.

Proctors for the parties waived the reading and signing of the testimony by the witnesses, agreeing that it should have the same force and effect as if read and signed by them.

I further certify that I am not of counsel nor in any way interested in the result of this suit.

Witness my hand and official seal this 1st day of September, 1915.

U. S. Commissioner.

COMMISSIONER'S TAXABLE COSTS.

Claimant—

Hearing August 31, 1915-----\$3.00

Transcribing 45 folios ----- 4.50

\$7.50

Indorsed: Supplemental Testimony. Filed in the United States District Court, Western District of Washington, Northern Division, Sept. 2, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

*United States District Court, Western District of Wash-
ington, Northern Division.*

GUST FONDAHN,

Libelant,

vs.

SCHOONER "C. S. HOLMES,"

Respondent.

No. 2539.

Filed September 14, 1915.

Daniel Landon, for Libelant.

Ballinger, Battle, Hulbert & Shorts, for Respondent.

NETERER, District Judge.

This is a suit in admiralty for injuries received by libelant while he was a sailor on the schooner "C. S. Holmes." On the afternoon of January 3, 1913, when the schooner was about ten miles off Cape Flattery the libelant received a compound fracture of his right arm. Both bones of the forearm were broken, "the periosteum was broken and torn along the end both ways. A circular wound about one and one-half inches in diameter through which both bones projected, and it showed a very ragged wound. The muscles were torn and the periosteum torn back. A very ugly wound." The injury occurred about six o'clock p. m. The wound was dressed by the master and sailors. The master "put the vessel around and sailed back." The tug that had taken the vessel to sea had returned and was out of sight. The wind was fair and the vessel proceeded on the course to Cape Flattery. When the schooner got off Neah Bay the tug "Prosper" was obtained to tow her to Port

Angeles. The schooner arrived at Port Angeles between five and six o'clock the next morning. The master of the schooner made inquiry as to a doctor and ascertained from the captain of the tug "Goliah" and also from the tug "Prosper," and from the "Snohomish," a government vessel and employed in and about Port Angeles, that there was a doctor at Port Angeles. Libelant was immediately taken to Dr. Taylor's office at Port Angeles, and upon advice of the doctor was taken to the hospital owned and operated by him, and about eight o'clock in the morning the arm was dressed. The master of the ship gave the doctor a permit to admit the libelant to the Marine Hospital at Port Townsend, to which place he was taken as soon as he could move. Before landing at Port Angeles libelant requested of the master that he be taken to the Marine Hospital at Port Townsend. The distance from Port Angeles to Port Townsend is from three to six hours. Libelant remained in the hospital with Dr. Taylor at Port Angeles, and under his care and treatment, until January 11th, at which time, at the suggestion of Dr. Taylor, he went to the Marine Hospital at Port Townsend. Dr. Taylor treated the wound, but after several days some complications set in and the arm "began to fester," and it later developed that the bones had not been in apposition and did not unite and have not united at this time; that at the Marine Hospital an operation was performed and Lane plates applied, but that no cure has been effected, and that a further operation will be necessary, the result of which cannot be assured.

The contention of the libelant is that the master was negligent in the duty which he owed to him in not taking him to the Marine Hospital at Port Townsend, and in taking him to a doctor at Port Angeles. It is further contended that he failed to make any arrangement with Dr. Taylor at Port Angeles for compensation, and that by reason of that libelant did not get the treatment which was necessary, and that he was compelled to pay, and did pay, to Dr. Taylor the sum of \$30.00 for treatment which he had received, and contends that the treatment given by Dr. Taylor was not proper, and that by reason thereof his arm has been destroyed, and asks compensation. Respondent contends that it was the duty of the master to take the injured sailor to the nearest medical service, and that the performance of this duty discharged the vessel from any further obligation, and insists that the treatment accorded to libelant was proper treatment, and that even though it were not, that the respondent cannot be held for any malpractice on the part of the physician; that the only duty which devolved upon the vessel was to exercise its best judgment, acting as a reasonably prudent person, in obtaining proper medical skill, and that its duty was performed.

The greater part of the briefs in this case have been devoted to the discussion of the treatment which was given to the libelant by the attending physician. This, I do not think, can be of much aid to the court in determining the issue which is presented here. The issue, as I view it, is: Did the master discharge his legal duty

in securing the services of a physician and surgeon for the libelant? It was the duty of the master, upon the sailor's injury, to afford him every relief at hand and to furnish him with medical attendance at the earliest possible moment. *The Troop*, 128 Fed. 156. The first question to be determined in this case is whether the master did discharge his duty towards the libelant in affording him the proper medical attendance. If that is determined in favor of the master the case is ended; if not, then it must be determined whether he was furnished with the proper medical attendance. The master testifies that he put into Port Angeles because the injury had occurred about twelve hours prior to his arrival there; that it would have taken until the afternoon of that day to reach Port Townsend. Other witnesses say from three to six hours. And the master says that he believed it was his duty to go into the first port where medical assistance could be obtained, and that he made inquiry from the various captains of the several tugs and they all stated that there was a physician and surgeon at Port Angeles, and he understood him to be a marine doctor. It is conceded, I think, by the record, that the doctor in whose custody the libelant was placed was a regularly licensed and practicing physician. There were eleven physicians in the city, and two hospitals, one of which was owned and conducted by Dr. Taylor, the physician employed by the master. The testimony also shows that the physician employed had been employed prior to that time in emergency cases by the United States

ship "Snohomish," which was lying at Port Angeles, and that the captain of that ship suggested the doctor or confirmed the master's inquiry with relation to this physician. The doctor himself says, and this is not contradicted, that he was appointed surgeon for the Milwaukee Railroad; that he has a contract for the Port Crescent Shingle Mill Company; the Howell, Hill & Ray Shingle Mill Company; Hanson, Ballard Shingle & Saw Mill Company, and the Merrill Mill Company; also that he has a contract with the county to do the county medical work, and also was the doctor for the Erie Construction Company while they were building roads there; and that he engaged in general practice. He says that his hospital is equipped with all of the modern appliances and conveniences for medical service and treatment, and that there is not a better equipped hospital in the state. The testimony in this case, if true, and there is no evidence in the record which overcomes the burden of proof, shows that the master exercised all reasonable diligence and fulfilled his legal obligation in the providing of the medical attendance which was done. It would have been better, no doubt, if this libelant could have been taken to the Marine Hospital at Port Townsend. His arm was very severely injured. I doubt whether an injury of this kind could have been much more severe. Twelve hours had already elapsed from the time of the injury. The man was suffering much pain. Information with relation to the physicians at Port Angeles was obtained, it would seem, from authoritative sources. Investigation showed

equipment for treating cases of this character which was ample, and there is nothing that occurs to me now that was presented that should have cast a suspicion upon a conclusion of the competency of the physician, on the part of the master. The fact that the master gave to the physician a permit, as testified to by the libelant, upon a false statement or representation as to the physician's compensation, can, under the testimony of the master and the physician himself, have no controlling influence. The physician did accept the patient; did treat him for the period of eight days, if the testimony of the two doctors and the nurse is to be believed, and there is nothing in the record that would justify the court in disregarding this evidence. Each case, as stated by the Supreme Court of the United States, in the *Iriquos*, 194 U. S. 240, must be determined upon its own circumstances, having reference to the seriousness of the injury, and it seems to me that under all of the circumstances in this case as disclosed by the evidence, the master cannot be held to such negligence in placing the libelant in the care of the physician at Port Angeles as to justify a recovery in this case. The accident is most unfortunate. The condition of the libelant's arm is very unsatisfactory. It will require further operation. But the fact that it is in this condition does not of itself support recovery. If the libelant was improperly treated the vessel could not be held unless default is first shown on the part of the master. The duty of the master was fully performed when he exercised the care which the evidence shows

in this case, to select a reasonably competent physician, and the vessel is responsible only for the negligence of the master in the discharge of this duty and not for that of the physician which was employed. *Laubhein v. Netherlands S. S. Co.*, 13 N. E. 781; *Campbell v. Frank Gilmore*, 43 Fed. 318; *Union Pacific Railway Co. v. Artist*, 60 Fed. 365. There is no evidence in this case that the physician employed was incompetent. There is no testimony of physicians other than those employed by the master and the physicians at the Marine Hospital, and the most that can be said of the testimony is that the physician of the Marine Hospital stated that he would have employed a different treatment. But there is no evidence that the treatment that was given by Dr. Taylor was not proper treatment and not such treatment as is recognized by medical science, and the mere fact that a different treatment would have been adopted by the marine doctor would not be evidence against the method that was adopted (*Lorenz v. Booth*, Vol. 42 Wash. Dec. page 303), and the mere fact that infection occurred would not lend support to libellant's contention of either negligence or incompetency. *Peterson v. Wells*, 41 Wash. 693. The fact that the physician who was employed by the master took charge of the case and gave the treatment and applied methods recognized and approved by those reasonably skilled in the profession, confirms the conclusion and conduct of the master, and does not incur liability on failure to cure, if the treatment is given with a reasonable degree of skill and care (*Wells v. Ferry-Baker Lum-*

ber Co., 67 Wash. 658), and failure to effect a cure, of itself, does not in any sense show negligence on the part of the physician. *Hoffman v. Watkins*, 78 Wash. 118.

I think that the vessel is liable for the amount of money which was paid by the libelant to the physician in effecting a cure, which was thirty dollars, and is also liable for the regular wage on the trip, which, from the evidence, I think is established, was forty-five dollars.

JEREMIAH NETERER, Judge.

Indorsed: Filed in the United States District Court, Western District of Washington, Northern Division, Sept. 14, 1915. Frank L. Crosby, Clerk. By E. Mfl L., Deputy.

In the United States District Court for the Western District of Washington, Northern Division.
In Admiralty.

GUST FONDAHN,

Libelant,

vs.

SCHOONER "C. S. HOLMES,"

Respondent.

No. 2539.

DECREE.

This cause came on regularly to be heard upon the amended libel of the libelant and the answer to the amended libel and the reply thereto, the testimony having been taken before A. C. Bowman, Esq., United States Commissioner, to whom the matter was referred, the libelant and the respondent having submitted briefs, and the Court being fully advised in the premises made and entered, its memorandum decision upon the merits, filed

September 14, 1915, wherein it found that the libelant was not entitled to damages for the second cause of action, and that he was entitled to judgment for the sum of Thirty (\$30.00) Dollars for money expended for medical treatment, as set forth in the third cause of action, and for the sum of Forty-five (\$45.00) Dollars, as set forth in the fourth cause of action.

In pursuance of the memorandum decision heretofore filed in the above entitled action, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the libelant have and recover nothing against the respondent for the second cause of action, and have and recover the sum of Thirty (\$30.00) Dollars against the respondent upon the third cause of action, and the further sum of Forty-five (\$45.00) Dollars against the respondent in the fourth cause of action, together with the libelant's costs.

Libelant excepts to the memorandum decision and to this decree and to the entering of the same, each and every part thereof, as to the second cause of action, which exceptions are allowed. Respondent objects to the allowance of costs to libelant.

Done in open court this 4th day of October, 1915.

JEREMIAH NETERER, Judge.

Service of the within decree by delivery of a copy to the undersigned is hereby acknowledged this 27th day of September, 1915.

BALLINGER, BATTLE, HULBERT & SHORTS,
Proctors for Respondents.

Indorsed: Decree. Filed in the United States District Court, Western District of Washington, Northern Division, October 4, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

*In the United States District Court for the Western Dis-
trict of Washington, Northern Division.
In Admiralty.*

GUST FONDAHN,

Libelant,

vs.

SCHOONER "C. S. HOLMES," etc.,

Respondent.

No. 2539.

NOTICE OF APPEAL.

SIRS:

Take notice that the libelant above named hereby
appeals to the United States Circuit Court of Appeals
for the Ninth Circuit from the final decree, entered herein
October 4th, 1915.

Yours respectfully,

DANIEL LANDON,

Proctor for Libelant and Appellant.

To Ballinger, Battle, Hulbert & Shorts,

Proctors for Respondent and Appellee.

FRANK L. CROSBY,

Clerk of the United States District Court for the Western
District of Washington, Northern Division. In
Admiralty.

Service of the within Notice of Appeal by delivery
of a copy to the undersigned is hereby acknowledged this
5th day of October, 1915.

BALLINGER, BATTLE, HULBERT & SHORTS,

Proctors for Respondent.

ED. M. LAKIN, Deputy Clerk.

Indorsed. Notice of Appeal. Filed in the United
States District Court, Western District of Washington,
Northern Division, October 4, 1915. Frank L. Crosby,
Clerk. By Ed M. Lakin, Deputy.

*In the United States District Court for the Western Dis-
trict of Washington, Northern Division.
In Admiralty.*

GUST FONDAHN,

Libelant,

vs.

SCHOONER "C. S. HOLMES," etc.,

Respondent.

No. 2539.

PETITION ON APPEAL, WITH ALLOWANCE ENDORSED.

TO THE HONORABLE JEREMIAH NETERER:

The above named libelant conceiving himself aggrieved by the order, findings and final decree made and entered by the above named Court wherein and whereby, among other things, it was found and decreed that the libelant take nothing by reason of the damages suffered by him, as set out in the second cause of action in the amended libel, the said libelant does hereby appeal from said finding and decree and prays that libelant's petition for his said appeal be allowed and that a transcript of the records, proceedings and papers, namely: the Amended Libel, Respondent's Answer, Libelant's Reply, all testimony taken and exhibits offered in evidence, the opinion of the Court and the Final Decree, and that the same be duly authenticated and be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

DANIEL LANDON,

Proctor for Libelant.

The foregoing petition on appeal is granted, and the demands therein made, allowed.

Dated October 14th, 1915.

JEREMIAH NETERER, Judge.

Service of the within Petition on Appeal by delivery of a copy to the undersigned is hereby acknowledged this 6th day of October, 1915.

BALLINGER, BATTLE, HULBERT & SHORTS,

Attorneys for Respondent.

Indorsed: Petition on Appeal with Allowance Indorsed: Filed in the United States District Court, Western District of Washington, Northern Division, October 14, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

*In the United States District Court for the Western
District of Washington, Northern Division.
In Admiralty.*

GUST FONDAHN,

Libelant,

vs.

SCHOONER "C. S. HOLMES",

Respondent.

No. 2539

ASSIGNMENT OF ERRORS.

Comes now the above named Gust Fondahn, libelant in the above entitled cause, and says that in the record and proceedings in said cause and in the decision of the Court and the final decree, made and entered therein on the 4th day of October, 1915, there are manifest errors in the following particulars:

I.

The Court erred in finding that the master discharged his duty toward the libelant in affording him proper medical attendance.

II.

The Court erred in finding that the master discharged his duty toward the libelant prior to the time he was put ashore at Port Angeles.

III.

The Court erred in failing to find that the master performed his duty toward the libelant in any particular.

IV.

The Court erred in finding that the libelant received proper treatment, or any treatment at all, after he was first attended.

V.

The Court erred in not finding the allegations of the amended libel to be substantiated.

VI.

The Court erred in not entering judgment for libelant as prayed for against the respondent in the second cause of action.

WHEREFORE, libelant prays that the said decree may be reversed, modified and corrected in the particulars herein set forth, and such decree entered therein as ought to have been entered by the said District Court.

DANIEL LANDON,

Proctor for Libelant.

Service of the within Assignment of Errors by delivery of a copy to the undersigned is hereby acknowledged this 9th day of Oct., 1915.

BALLINGER, BATTLE, HULBERT & SHORTS,

Attorney for Respondent.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 14, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

*In the District Court of the United States for the Western
District of Washington, Northern Division.
In Admiralty.*

GUST FONDAHN,

Libelant,

vs.

SCHOONER "C. S. HOLMES",

Respondent.

No. 2539

COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, That we, Gust Fondahn, Libelant in the above entitled action, as principal, and the New England Equitable Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of Massachusetts, and authorized to transact business as surety in the State of Washington, as surety, are held and firmly bound unto the Schooner "C. S. Holmes", in the sum of Two hundred fifty (\$250.00) dollars, lawful money of the United States, to be paid to the Schooner "C. S. Holmes", for the payment of which sum well and truly to be made, we bind

ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 6th day of Oct., 1915.

WHEREAS, the above bounden principal, Gust Fondahn, as Appellant, has prosecuted an appeal to the United States Circuit Court of the United States, bearing date of 6th day of October, 1915, in a suit wherein Gust Fondahn is libellant against the Schooner "C. S. Holmes", her tackle, apparel, etc.:

Now, therefore, the condition of this obligation is such that if the above named appellant, Gust Fondahn, shall prosecute said appeal with effect, and pay all costs which may be awarded against him, as such appellant, if the appeal is not sustained, then this obligation shall be null and void; otherwise to remain full force and effect.

In testimony whereof, witness our hands and seals the day and year first above written.

GUST FONDAHN,

(Seal.)

Principal.

NEW ENGLAND EQUITABLE INSURANCE CO.

And George M. Crawford, Attorney in Fact.

By Robert E. Dwyer, Attorney in Fact,

By SEELEY & CO.,

Attest: By Geo. M. Crawford.

General Agents.

The above bond approved this 14th day of Oct., A. D. 1915.

JEREMIAH NETERER, Judge.

Service of the within Cost Bond by delivery of a copy to the undersigned is hereby acknowledged this 6th day of Oct., 1915.

BALLINGER, BATTLE, HULBERT & SHORTS,

Attorneys for Respondent.

Indorsed: Cost Bond on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 14, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

GUST FONDAHN,

Libelant,

vs.

SCHOONER "C. S. HOLMES", her
tackle, apparel, furniture, etc.,

Respondent.

No. 2539

ORDER.

Now on this 19th day of October, 1915, upon motion of Proctor for Libelant and for sufficient cause appearing:

IT IS ORDERED That the Libelant's exhibits A, B, C and D filed and introduced as evidence upon the trial of this cause, be by the Clerk of this Court forwarded to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, there to be inspected and considered, together with the transcript of the record on appeal in this cause.

JEREMIAH NETERER, District Judge.

Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 19, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

*In the United States District Court for the Western
District of Washington, Northern Division.
In Admiralty.*

GUST FONDAHN,

Libelant,

vs.

SCHOONER "C. S. HOLMES", Etc.,

Respondent.

No. 2539

STIPULATION.

Is is hereby stipulated by and between the proctor for libelant and respondent that the record on appeal shall contain only the amended libel, respondent's answer, all testimony taken and exhibits offered in evidence, the opinion of the Court, the final decree, notice of appeal, petition on appeal with allowance endorsed, assignment of errors, and cost bond on appeal.

DANIEL LANDON,

Proctor for Libelant.

BALLINGER, BATTLE, HULBERT & SHORTS,

Proctors for Respondent.

Service of the within Stipulation by delivery of a copy to the undersigned is hereby acknowledged this 6th day of Oct., 1915.

BALLINGER, BATTLE, HULBERT & SHORTS,

Attorneys for Respondent.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 14, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

*In the United States District Court for the Western
District of Washington, Northern Division.
In Admiralty.*

GUST FONDAHN,	} <i>Libelant,</i>	} No. 2539.
<i>vs.</i>		
SCHOONER "C. S. HOLMES," Etc.,		
<i>Respondent.</i>	}	}

STIPULATION

It is hereby stipulated by and between the proctor for the libelant and proctors for respondent, that the exhibits be not put in the printed record but that the originals be sent to the Circuit Court of Appeals and considered the same as if copies were printed.

DANIEL LANDON,

Proctor for Libelant.

BALLINGER, BATTLE, HULBERT & SHORTS,

Proctors for Respondent.

In the United States District Court for the Western District of Washington, Northern Division.

GUST FONDAHN,	$\left. \begin{array}{l} \textit{Libelant,} \\ \\ \textit{Respondent.} \end{array} \right\}$	<i>In Admiralty.</i> No. 2539
<i>vs.</i>		
SCHOONER "C. S. HOLMES," Etc.,		

ORDER EXTENDING TIME TO FILE APOSTLES ON APPEAL.

Good cause appearing therefore, it is ordered that Gust Fondahn, libelant in the above cause, may have to and including the 8th day of December, 1915, within which to procure to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the Apostles on Appeal in the above entitled cause, certified by the Clerk of the above named court.

Done in open Court this 8th day of November, 1915.

O. K.—ROBT. A. HULBERT.

JEREMIAH NETERER, Judge.

Service of the within Order by delivery of a copy to the undersigned is hereby acknowledged this 5th day of Nov., 1915. Proctor for Respondent.

Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 8, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

*In the District Court of the United States for the Western
District of Washington, Northern Division.*

GUST FONDAHN,	} No. 2539
<i>Libelant,</i>	
<i>vs.</i>	
SCHOONER "C. S. HOLMES", her tackle, apparel, furniture, etc.,	
<i>Respondent.</i>	

**CERTIFICATE OF CLERK U. S. DISTRICT COURT TO
APOSTLES, ETC.**

United States of America,	} ss.
Western District of Washington,	

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing pages, numbered from 1 to 181, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of said cause in the United States Circuit Court of Appeals for the Ninth Circuit, and as is called for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitutes the record on appeal to the said Circuit Court of Appeals for the Ninth Circuit from the judgment of said United States District Court for the Western District of Washington.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the Proctor for Libelant, for making record, certificate or return

to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to-wit:

Clerk's fee (Sec. 828 R. S. U. S.) for making record, certificate or return, 384 folios at 15c----	\$ 55.60
Certificate of Clerk to transcript of record, 4 folios at 15c -----	.60
Seal to said Certificate-----	.20
Certificate of Clerk to Original Exhibits, 3 folios at 15c -----	.45
Seal to said Certificate-----	.20
Statement of cost of printing said transcript of record, collected and paid-----	^{156.95} 233.75
Total-----	^{216.00} \$290.80

I hereby certify that the above cost for preparing and certifying record, amounting to ^{216.00} \$290.80, has been paid to me by Daniel Landon, Esquire, Proctor for Appellant.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said District, this 1st day of December, 1915.

FRANK L. CROSBY,

(Seal.)

Clerk United States District Court.

*In the District Court of the United States for the Western
District of Washington, Northern Division.*

GUST FONDAHN,	} No. 2539
<i>Libelant,</i>	
<i>vs.</i>	
SCHOONER "C. S. HOLMES", Etc.,	}
<i>Respondent.</i>	

CITATION ON APPEAL.

UNITED STATES OF AMERICA, SS.:

The President of the United States to Schooner "C. S. Holmes," Respondent herein, and to Ballinger, Battle, Hulbert and Shorts, Its Proctors, herein, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, California, within thirty (30) days from the date hereof, pursuant to an appeal to the said Court duly filed in the office of the Clerk of the United States District Court for the Western District of Washington, Northern Division, wherein the said Gust Fondahn is appellant, and you, the Schooner "C. S. Holmes," are appellee, then and there to show cause, if any there be, why the decree of the United States District Court for the Western District of Washington, Northern Division, in the above entitled cause, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS THE HONORABLE EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 18th day of October, 1915.

JEREMIAH NETERER,
(Seal.) Judge of the United States District Court,
for the Western District of Washington.

Service of the within Citation on Appeal by delivery of a copy to the undersigned is hereby acknowledged this 18th day of October, 1915.

BALLINGER, BATTLE, HULBERT & SHORTS,
Attorneys for Respondent.

Indorsed: Original. No. 2539. In the District Court of the United States for the Northern Division, Western District of Washington. Gust Fondahn, Plaintiff, vs. Schooner "C. S. Holmes," Defendant. Citation on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 18, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. Service of papers in this case may be made on Daniel Landon, Proctor for Libelant. 1054-5-6 Empire Bldg., Seattle, King County, Washington. Phone Main 4602.

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IN THE
UNITED STATES
CIRCUIT COURT of APPEALS

FOR THE NINTH CIRCUIT

GUST FONDAHN,		Appellant,
	vs.	
SCHOONER "C. S. HOLMES,"		Appellee.
Etc.,		

No. 2698

BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION.

DANIEL LANDON,
Proctor for Appellant.

1054-55 Empire Building, Seattle, Wash.

MONT W. GAY & SON, PRINTERS, SEATTLE

FILED

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F. H. HOSKINSON



IN THE
UNITED STATES
CIRCUIT COURT of APPEALS

FOR THE NINTH CIRCUIT

GUST FONDAHN,

Appellant,

vs.

SCHOONER "C. S. HOLMES,"
Etc.,

Appellee.

No.

BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION.

DANIEL LANDON,

Proctor for Appellant.

1054-55 Empire Building, Seattle, Wash.

STATEMENT

It is contended by Gust Fondahn, the appellant herein, that after he was injured, the captain of the Schooner "C. S. Holmes," appellee herein, did not provide medical and surgical treatment and that as a result his arm, the bones of which were broken, decayed, rendering the same useless.

When the case was before this court before, it was upon an appeal from the lower court's order sustaining the exceptions to the amended libel. The lower court's decision is found in *Fondahn v. Schooner "C. S. Holmes"*, 212 Fed. Rep. 525. This court reversed the lower court on the question involved here, in *Fondahn v. Schooner "C. S. Holmes,"* 220 Fed. Rep. 273. The appellee then answered by general denial and set up an affirmative defense. No evidence having been offered pertaining to appellee's affirmative defense, so that the issues as formed in the lower court were upon the amended libel and appellee's general denial. The testimony was taken before the U. S. Commissioner, transcribed, and filed with the court and the court from the testimony found for the appellee upon the issues herein appealed from (Record, p. 159 to p. 166).

Gust Fondahn, appellant herein, signed on board the Schooner "C. S. Holmes" during the month of December, 1912, for a voyage from San Francisco,

California to Everett, Washington and return. The schooner was loaded for her return voyage with a cargo consisting of lumber and piling, at Everett.

On January 3rd, 1913, after some delay by reason of high winds, the Tug "Goliah" towed the "Holmes" out from Neah Bay to the Ocean. When they got her to the open seas, the captain of the "Holmes" gave orders to cut the lashing loose that held the wire, or tow line, and this appellant responded to the order; in doing so he was struck by the wire, causing a compound fracture of his right arm and paralyzing and bruising his side. The accident occurred about the hour of 7 o'clock P. M. on the 3rd day of January, 1913.

The captain of the "Holmes" gave orders to go back to Port Angeles. The appellant requested the captain to take him direct to Port Townsend, where the Marine Hospital was located. The captain informed the appellant that it would cost \$100 more to do so. On the return voyage, the captain asked the captains of other vessels if there was a doctor in Port Angeles and they informed him that there was. Prior to the time they arrived in Port Angeles, the appellant again requested him to take him to the Marine Hospital at Port Townsend. The captain again refused to do so.

The "Holmes" was towed into Port Angeles about the hour of 3 o'clock A. M., and the captain and

crew "turned to" until about the hour of 7 o'clock in the morning, when the captain took the appellant ashore and made inquiries in Port Angeles for a doctor and was directed to Dr. Taylor by a police officer of that city. The captain gave Dr. Taylor a permit which would entitle appellant to be admitted at the Marine Hospital at Port Townsend, and represented to him that that permit would be good for his services and expenses incurred. The doctor questioned the permit, but the captain then told him that the appellant was in the doctor's charge and off from the captain's hands.

After some discussion and delay the appellant was finally taken to the hospital, out about a mile and a half from the office of Dr. Taylor, and at 11 o'clock in the presence of the captain, appellant's arm was cleaned and temporarily bandaged and from that time on until the 11th of the month, some seven days, no further treatment was received.

Some two days after arriving at the hospital, an X-ray photograph was taken of the arm and it was disclosed that the bones were out of position. Shortly after arriving at the hospital, blood-poisoning set in and by the time he arrived at Port Townsend, the life had been eaten out of the tissues of his arm, and a large amount of puss had formed during the time he was in Port Angeles.

While appellant was at Port Angeles, Dr. Taylor

several times requested the appellant to proceed to Port Townsend but the appellant's physical condition was such that he could not do so until he had been there seven days. When the appellant left he paid Dr. Taylor the sum of \$30.00, that being the usual charge for hospital fees and incident thereto, but did not include any charges for operation or surgical treatment. No charge was made, none having been had.

When the appellant left Port Angeles, Dr. Taylor gave him a letter addressed to the Marine Hospital at Port Townsend, informing him that appellant had been left off at Port Angeles from the "C. S. Holmes" and came under his care and that he had no arrangements for that class of cases and that as soon as it was possible he had moved him and that he had taken an X-ray photograph of the injury, which showed that the bones could not be gotten in place without plating.

The appellant upon his arrival at Port Townsend, immediately received attention from the physicians and surgeons in charge of the hospital and after fourteen days of treatment the infection subsided sufficiently to attempt to set the bones, but as it had been neglected at Port Angeles, the tissues were dead and the ends of the bones decayed so the plates, as will be seen by the exhibits, would not hold the arm in place, resulting in the appellant having

an arm that is entirely useless.

ARGUMENT

We believe it will be seen from the evidence that the findings of the District Court are not borne out by the testimony, and that the allegations of the libel are enlarged substantially and fully proven.

It appears more convenient if we take the assignment of errors, and the testimony, in sections, and argue from that basis.

Assignment of Error No. 2.—“The court erred in finding that the master discharged his duty toward the appellant prior to the time he was put ashore at Port Angeles.” (Record, p. 171).

It will be seen from the evidence that the appellant did not contribute to his injuries and was doing his full duty in fearlessly obeying the orders of the captain, when injured.

At the time of the injury, appellant testified, that the captain was standing about 4 feet above him and about 8 feet away, talking to him, where he could see everything going on, and that appellant asked the captain how the wire was over the bow,—that the appellant could not see—and that he told him that the wire was slack and he said everything was alright to let go.

Mr. Hulst, a member of the crew and a witness

for appellant, testified that the captain had ordered them to let go of the cable. That the appellant had obeyed the orders of the captain and that the rest of the crew were afraid to go down, there being a high sea and the water was coming over all the time and that the appellant cut the lashing and jumped away, but did not get far enough away when the cable struck him.

The captain testified: "I told him to be careful and get out of the way after he cut the lashing loose—to get out of the way and run; he did run, but he did not, quick enough."

When the captain gave orders to go back to Port Angeles, the appellant testified that he asked the captain why he went to Port Angeles as they had the whole night to go to Port Townsend and the captain told him it would be too much expense, that it would cost one hundred dollars; that there was a marine doctor in Port Angeles.

Ludvig Hulst, a seaman and a witness for the appellant, testified as to what happened after the appellant was injured. His testimony is clear and concise and corroborated by the appellant and we venture to say that it is doubtlessly true in every particular and we are taking the liberty to set it out in material part, it being as follows:

"The captain went to the deck and put the

boat about, put the vessel around again to go in. When the captain went around, he came down again, and Gust says where are you going, captain? And the captain says I guess I will go to Port Angeles, there is a doctor in there. Gust says, why don't you go and take me right up to Port Townsend, so that I could get in the hospital and everything would be clear. After while the captain says I don't want to go up there, it would cost me a hundred dollars more. Of course he didn't say nothing more then, he was almost all in, and I was washing his arm and everything. And I asked the captain for something to bandage to put around his arm and the captain didn't have none, so Gust he had some small cloths in a kind of sewing bag and I got hold of that and I put that around his arm. And I put some papers on and the bandage around. And we went in to Neah Bay. And the big tug that took us out came out and asked our captain what was the matter. And the captain says we got a man badly hurt. He says where do you want to go now? And the captain says I want to go to Port Angeles. Well, he says, I can take you up there if you want. No, says the captain, you are too big for us; I don't want you but you can have the "Prosper" come and let her take us up, she is a smaller boat, she is not got so big a cable, and the "Prosper" came out and told our captain to lower down the sail and asked us if he wanted to go to Angeles, and he says yes, I want to go to Angeles, there is a doctor there? And

the captain of the "Prosper" said yes, there is a doctor there in Angeles. Well, we came up, I could not say exactly the time, but I suppose it was a little before three or a little after three in the morning when we came to Port Angeles. We just lowered down the sail and we all went in to bed to sleep until daylight. As soon as daylight we got up and had breakfast and the tug boat came alongside, and they took Gust on shore, and what happened after he got ashore I do not know.

"Q. Now, did you ever have any conversation with the captain of the C. S. Holmes?

A. I had when we came out to sea again.

Q. What was that conversation?

A. I asked him how Gust was getting along, and the captain says, he is all right, the doctor told me there was just a clean break, just broke clean off and it would be all right pretty soon. That is what he told me and I said to him one day, that doctor in Port Angeles is not a marine doctor. Well, the captain says, I don't think he is, but he is just as well off there as he would be anywhere else. But the captain knowed there was no marine doctor there, and knew that before we went in. (Record, p. 32 to p. 34)

The testimony shows that they had a favorable tide and a fair wind on the return. The captain testified that the reason he went to Port Angeles

was because he was going to the nearest doctor and that the captains of the "Goliah" and the tug "Prosper" had informed him that there was a marine doctor at Port Angeles.

The captain on cross examination testified that after he had anchored at Port Angeles, that the libelant had asked him to go to Port Townsend and that he had said in reply that it would be an unnecessary expense to do so. It would seem that if any further proof was necessary to convince the court that it was a matter of expense that caused the captain to decide to go to Port Angeles, it was given by the captain himself, on cross-examination. It being as follows:

"Q. What excuse have you to give for not going to Port Townsend?

A. I went to the nearest doctor.

Q. What was the excuse you gave at that time?

A. To go to the nearest doctor.

Q. What was the excuse you gave. You just testified that you told him it would cost a hundred dollars more?

A. That was a side issue, a side remark.

Q. It was a side issue?

A. It was at the time.

Q. You mentioned the side issue rather than the main one?

A. I did at the time, sure I did, I will admit that." (Record, p. 85).

The appellant in obedience to the order of the master of the ship, had done that which others of the crew were afraid to do. He had gone so to speak "into the jaws of death." And while still writhing in pain and doubtlessly, despairing of his life, he had simply requested that he be taken to Port Townsend and still in face of these facts, the captain now contends that he did not give the real reason for going to Port Angeles.

In the ordinary course of events, the appellant would have obtained treatment as soon, if not sooner at Port Townsend than he would at Port Angeles.

A fair deduction of the testimony will disclose the fact that they arrived in Port Angeles at about the hour of 3 o'clock A. M.; that they lowered down the sails and they all went to bed and slept until daylight, (the time of the year being January 4th), until around 7 o'clock, probably between 7 and 8. Then he was taken to Dr. Taylor's office and later removed to the hospital, receiving no medical aid until between 10 and 11 o'clock that morning. To have gone to Port Townsend would not have taken them any longer than 9 o'clock at the most.

Surely as much, if not more, argument can be advanced that it was reasonable to suppose that the injured man would have received as quick treatment at Port Townsend as he would have at Port Angeles so that any contention upon the part of the appellee in this regard is nothing more nor less than a poor excuse, having absolutely no merit in law or in fact.

Assignment of Error No. 1—"The court erred in finding that the master discharged his duty towards the libelant in offering him proper medical attendance." (Record, p. 17).

Gust Fondahn, the appellant, testified:

"The captain took me up to Dr. Taylor, Taylor Brothers, which I found out was no marine doctor. The captain wrote out a hospital permit for me. This permit is only good for me to be accepted in the marine hospital at Port Townsend. The captain says here is a paper doctor, to send him to the Marine Hospital at Port Townsend; and all you have to do for him, and that will square all your expenses. After a minute the doctor asked the captain, he says, I want you to explain this piece of paper. The captain told him, I have got nothing to explain, the man is in your care now and he is out of my hands. After that they took me up to the doctor's hospital and I got chloroformed, and they tried to fix my arm temporarily, as far as I knew. I got out of the chloroform and I

recollect the captain was there. But I would not be responsible to give evidence as to what happened. Well, two days after I was in bed, I was helpless, could not get up. The doctor came in the morning and piled my clothes there and wanted to know if I could get up off the bed. I told him no, doctor, it is impossible, I cannot move. I says what is the matter, doctor, anything going wrong? He says no, and he went out. And I spoke to his brother the same day in the afternoon and he told me the truth, he says we find out that the captain gave us a false statement about this piece of paper, and we can get no money from the Marine Hospital, and the sooner you get out of bed it will be cheaper for you. I explained to the doctor that by the marine law I was allowed to get a doctor and hospital and medical attendance. He said I don't know nothing about that, for to clear ourselves we will have to look for the pay from you. Well, I was thinking about my arm. I could not get no more treatment, and I considered it best to get up as quick as possible. I asked the doctor, in case I got well enough to get up, how much the bill would be, and the doctor told me he would make it cheap under the circumstances, we will only charge you thirty dollars. I told the doctor I would put the money up but I would not pay the bill. I got a receipt for the money. On a Saturday, eight days afterwards, the nurse helped me up and get on my legs. I was able to walk around in there, but I could not sit down. I got to the hospital, to the

Marine Hospital, and the doctor asked me why I did not come there first. He says your arm is in such shape that I could not do anything with you. My arm was all festered. It took two months and five days before they could set my arm, before my arm was in condition to set. The first week I came to the Marine Hospital they took an X-ray picture of my arm, and the fore-bone had overlapped—

MR. SHORTS: I object as not the best evidence.

Q. Did you turn those X-ray pictures over to me?

A. You have them, yes; I turned them over with all my papers.

MR. LANDON: I will produce the picture later.

Q. You may continue now.

A. The bone was overlapped and the arm contracted and it was about an inch shorter. And on the 8th of March I got operated on and they plated my arm bones together, and the arm was in such shape and so contracted the plate wont stand. The joints of the bone cave in. And the doctors themselves think there is a cave-in in one bone—

MR. SHORTS: I object to any statement as to what the doctors may think. The best

evidence would be the doctors themselves. I move to strike the statement and object to any further testimony along that line.

Q. What did they do to you?

A. The doctors?

Q. Yes.

A. They operated on me. They put plates in, silver plates. And the arm was contracted in such shape it would not stand it; it broke loose again and caved in.

Q. What did they do then?

A. It has been there ever since. I was in perfect physical health, for the abraisions healed up in eight days; there is nothing against me. I blamed the captain—

Q. You are still in the hospital there?

A. I am still there. From the 10th day of January. I got hurt the 3rd of January.

Q. Can you use your arm at the present time?

A. My arm for labor is permanently useless. I cannot lift nothing with it.

Q. How old are you?

A. Forty-one past, very near forty-two.

Q. What occupation have you been following?

A. Been going to sea all my life.

Q. And what wages were you earning?

A. Forty-five dollars a month.

Q. Including board on the vessel, of course?

A. Yes. I want to add that I wrote twice down to San Francisco—

Q. What correspondence, if any, have you had with the owners of the ship?

A. There was through the Union a man representing me to the owners, Mr. Tennyson representing the ship's owners. The man who was representing me in Port Townsend was Miller. I was helpless, I could not write; as far as that goes I could not write yet.

Q. Did you see the letters?

A. He showed me the letters, and told me that Tennyson was the representative of the ship.

Q. Go ahead.

A. The doctor in Port Angeles he sent a letter to me and told me he wrote to the captain and explained the case to him. I never got the money. But he promised, on one condition, if I wanted to sign an agreement not to prosecute them and to get two witnesses to sign, and he gave me a typewritten sheet of paper to that

effect. That is about all of my statement.”
(Record, p 20 to p. 24).

Captain Thompson's testimony:

“Q. Now what time did you get to the doctor's office, do you think, captain?

A. It was probably about eight o'clock, as near as I can remember, between eight and nine. I did not take the time. I know we had to wait a little while before he came.

Q. How did you get up there?

A. Walked up there.

Q. All of you walked?

A. Yes.

Q. And was the doctor at his office when you got there?

A. No, I guess we met him on the street.

Q. On the way up to the office?

A. Yes.

Q. And he turned around and walked back with you?

A. That is something that I really do not remember how it happened, where we did meet the doctor. I guess we did meet him on the street. I know the officer from the Snohomish

introduced me to the doctor, but whether it was on the street or not I do not remember that. That is something I cannot swear to.

Q. Well, what did you say to the doctor?

A. When we got to his office we had quite a talk. I asked him if he was a marine doctor and he said yes, he handled the marine cases.

Q. What did you say about Mr. Fondahn being hurt there?

A. I told him that the man had his arm broke and I had tried to fix it up myself in the evening, but it was now about fourteen hours after the accident happened and needed attendance, and of course asked him if he was a marine doctor and he said yes. I had a hospital permit and wrote it out at his desk, and I asked him if he would accept that and he said yes.

Q. And did you turn the permit that you made out, over to this doctor?

A. Right there, right in his office.

Q. Did he seem to know what it was? Did he ask any questions about it?

A. I took it for granted that he knew what it was. He did not ask any questions about it at all. I advised him to communicate with the hospital people in Port Townsend regarding the man, because he could walk at the time, and he could go right aboard some steamer for Port

Townsend that same day if the doctor would say so.

Q. Now what, if anything, was said by him about pay for his services in taking care of the man?

A. There was not a word said about payment at all.

Q. He took the permit you made out?

A. He took the permit I made out, and I told him that the man is now in your care.

Q. What did he say?

A. He said that is all right.

Q. What did the doctor do with him then??

A. He took him to the hospital, he and his brother has a hospital there.

Q. At Port Angeles?

A. Yes, it is customary in small places, where there is no regular marine hospital, the government has a ward in a private hospital.

Q. They took him up to this private hospital, did they?

A. Yes, sir.

Q. Did you go up to the hospital yourself to see him?

A. I went out afterwards.

Q. What time, captain?

A. About twelve o'clock.

Q. The same day?

A. The same day.

Q. Did you see Fondahn there in the hospital?

A. Yes.

Q. What condition was he in when you saw him?

A. He seemed quite happy; he had his arm all fixed, lying in bed. I had quite a long talk with him.

Q. Did the doctor say anything to you about paying for his services in taking care of the injured seaman?

A. Not a word.

Q. How long did you stay at the hospital?

A. Oh, probably half an hour.

Q. Did you pay Mr. Fondahn for his wages?

A. I did, right there.

Q. Paid him off in full there, did you?

A. Yes, right there.

Q. Well, then what did you do?

A. Then I went back to attend to my business.

Q. Back to your ship and went to sea?

A. Went to sea the following day. I could not get a tow that day, I could not get a tug.

Q. Now I will ask you, captain, if this is your first experience of having men hurt aboard ship?

A. No, it is not the first. I have had lots of them.

Q. I will ask you if there are marine doctors in practically all of the ports on Puget Sound?

A. Well, there is only one marine hospital on Puget Sound, that is at Port Townsend, but there are doctors appointed as marine doctors to attend to marine patients. There is one right here in Seattle and there is in Tacoma. And I have had a case in Bellingham and in Tacoma both, where the same thing happened, where a private doctor acted as marine doctor, and he accepted the hospital permit, and puts the patient in a private hospital in which the government supplies a ward.

Q. And keeps them there how long?

A. I really don't know what the time is. It used to be sixty days. It was reduced to thirty. Now I do not know what it is. They will keep

a patient there longer if he is unable to move.

Q. Just what did they do with him.

A. Sent him to the marine hospital.

Q. Did you ever take any injured seaman of your crew on this vessel or any other vessel, to the marine doctor at Bellingham?

A. I did.

Q. Did you make out a permit just as you did in this case?

A. I did, sir.

Q. Did the doctor there accept it and treat him?

A. They did and that is all. I had a man with a broken leg up there one time.

Q. Have you done the same thing in any other ports?

A. Tacoma and in San Pedro several times.

MR. LANDON: I object as not the best evidence.

Q. Was there ever any doubt in your mind but what this doctor Taylor, that was his name, at Port Angeles, was a marine doctor?

MR. LANDON: I object as incompetent, irrelevant and immaterial.

A. There is no doubt at all. Of course the man told me so himself and this man was listening to it and could hear. (Referring to libellant.)

Q. What inquiry had you made as to whether there was a marine doctor in Port Angeles?

A. From the two tug captains, and that officer from the Snohomish, they all told me the same thing. I took that as a good guaranty from the character of the men I asked. And I asked the doctor point blank whether he was a marine doctor and he said yes.

Q. Now if he had told you that he was a private doctor, would you have made out the same certificate?

MR. LANDON: I renew my objection.

A. I might have made it out but would he have accepted it?

Q. What would you have done with him? If he had told you he was a private doctor?

A. I naturally would have had to offer to pay him or guarantee his payment for the man. He would ask for a guaranty. (Record, p. 77 to p. 82).

CROSS-EXAMINATION

Q. You remember distinctly, do you, of not having any controversy as to who would pay;

nothing said about that?

A. Not one word when he accepted that permit?

Q. He accepted that permit?

A. Yes, sir.

Q. And you remember that you asked him if he was a marine doctor?

A. Yes, sir.

Q. And he told you he was?

A. Yes.

Q. And he said nothing at all about the permit that you were giving him?

A. No, he accepted the permit. I says will you accept this and he says yes.

Q. What was that permit, allowing him to go where?

A. To a marine doctor.

Q. To a marine doctor, that permit was.

A. Yes. Any marine doctor will accept that permit.

Q. And after you had given him that permit you told him that he was off your hands? and on his hands?

A. Yes.

Q. How did that question happen to come up?

A. I told him that when I left there.

Q. Why did you volunteer that statement, if you did volunteer it?

A. I do not remember the circumstances.

Q. Was not the doctor questioning the validity of the permit and you told him that he was off from your hands and on to his, now was not that the way it came up?

A. No.

Q. There was nothing said?

A. Not that I remember, no.

Q. You are interested in this vessel, are you captain?

A. I was at the time.

Q. You still work for the company?

A. I do.

Q. Work for what company?

A. J. E. Billings." (Record, p. 86 to 87).

Dr. W. J. Taylor testified on direct examination that he met the captain and the libelant about 5 or 6 o'clock in the morning. (Record, p. 93).

Dr. W. J. Taylor further testified on direct examination as follows:

Q. What, if any, paper did the captain give you, doctor?

A. He gave me as custodian, for this sailor, a paper that was to admit him to the Marine Hospital.

Q. What did you do with that paper?

A. I put it in my desk, in a drawer I have there, and when the sailor left I gave it to him.

Q. That was Fondahn. When you say sailor you mean Fondahn?

A. Yes sir.

Q. You gave this paper to him?

A. I gave him the paper that he took with him.

Q. That is the one the captain gave you?

A. Yes, that the captain gave to me.

Q. Now, doctor, is it true that you asked the captain to explain to you what that paper meant?

A. Which, the permit?

Q. When the captain gave you this paper, this permit or whatever it was, did you ask

the captain to explain the paper to you?

A. I did not ask him to explain, that is ridiculous to talk that way. I knew what the paper was. I did not need to ask any explanation.

Q. The reason I ask you the question is because Fondahn has already testified in the case and has stated that you asked the captain to explain the paper. Did you ever make any such statement?

A. No sir. The paper was a permit to the hospital at Townsend. I knew what the paper was.

Q. Had you ever had any of them before?

A. I have seen them before, yes. Sailors have to have them when they go from the office.

Q. Now, Mr. Fondahn further states in his testimony that when you asked for an explanation, you said the captain said he had nothing to explain, this man is in your hands now and out of mine. Was any such statement made with reference to the explanation of the paper?

A. No, I do not think there was anything of that kind.

Q. Was there any time, doctor, that you refused or neglected to give this man treatment?

A. No sir.

Q. Was there any time while he was there that you insisted upon him getting out and going away from your place?

A. No sir, there was no time. He could stay as long as he liked, but I told him that he was to go to the Marine Hospital as soon as he was able to go he should go there because that was the place provided for him; that that was his permanent place, this was only temporary arrangement—mine was just temporary.

Q. Now, when the captain came to you, I will ask you whether or not he asked you if you did marine work or not?

A. There was something to that effect. He asked me if I was a marine doctor. When I told him no, that I had done emergency marine service. He asked me if I was a marine doctor and I said no, because I am not.

Q. Now what did you tell him then—I understand that you told him you did emergency marine work?

A. That I had done before this time and have done it since, but emergency marine work.

MR. LANDON: I do not know that I am just right in this, but I think counsel is leading the witness as to what to say.

MR. HULBERT: I do not mean to, I simply repeated what I think the doctor said.

Q. Was there any other conversation about your work, or about pay, or anything else at the time?

A. I do not recollect anything else further, at all.

Q. The man was there, injured?

A. If I may explain to the court, this was in the morning, six o'clock, there was the man sitting in my office; he was suffering awful pain; the man got up and walked and then had to lie down. I gave him something to ease his pain, morphine, the man was in very great pain; I had to get him relieved as quick as I could, and there was no bartering there.

Q. Was there any discussion about fees?

A. No, I was not in a position, having a man suffering, I was going to do that emergency work while I could. I have these cases frequently from ships and from the woods there and I never stop, I cannot stop to barter with a man about the pay. This man, you understand, had a very severe case, he was in a bad way". (Record, p. 103 to p. 106).

The same witness on behalf of the appellee, testified on cross examination in part as follows:

Q. (Mr. Landon) Now, doctor, when was the first time any one said anything to you about being paid for your services.

A. I don't know that anybody did say anything about paying for my services.

Q. Not at all;

A. No sir. The first reference to pay, if you wish me to tell you that, was when Fondahn was leaving, he left on Saturday. Fondahn had with him a hundred and some dollars which I deposited in the bank, and I told Fondahn that the way I did with these cases off emergency ships, not off government ships, that the captain or the man himself had always paid me and I gave him a receipt so that he could collect it from the company or wherever he could.

Q. Nothing else said either way about it?

A. And he had the money with him, and if he would do that it would save me a lot of trouble, and he would be closer to the people than I would, and there was not a word about it and he agreed to it.

Q. The captain did not say anything about pay, at all?

A. No sir.

Q. He gave you a permit that you knew was only good at Port Townsend?

A. He did not give me a permit as directed to me. He gave me a permit to give to Fondahn

to admit him to Port Townsend hospital. That permit had absolutely nothing to do with me.

Q. He made no arrangements with you about pay for your services?

A. No sir.

Q. The captain made no arrangements whatever?

A. Nothing whatever. The captain could not have been there at the end of the service, and as I told the man he could pay me or I would get it from the company afterwards.

Q. Now you are as sure of that as anything else that you have testified to. You remember that the captain did not make any arrangements about pay at all.

A. Made no arrangement.

Q. The captain stayed there until when?

A. I would not be positive when the captain left; I saw him the next day a couple of times.

Q. Nothing said then at all?

A. Nothing said at all." (Record p. 107 to p. 109).

The testimony of the appellant needs no explanation for the simple reason that it is the truth. But the same can not be said regarding the captain's

and Dr. Taylor's evidence.

The captain testified that he and the appellant arrived at the office of the doctor between 8 and 9 o'clock; that they had quite a talk; that he asked the doctor point blank if he was a marine doctor and he said yes; that the doctor understood the permit and that if he had have been a private doctor he would have had to offer to pay him or guarantee his payment. And he further testified "I do not remember just the circumstances but when I said goodbye to him, or something, I says now the man is in your charge and off from my hands, in your charge." (Record p. 90).

Dr. W. J. Taylor testified that it was between 5 and 6 o'clock in the morning when they arrived at his office and that the captain did not give a permit for him to act as a doctor, that he gave him a permit for Fondahn, to admit him to the Port Townsend hospital and that the permit had absolutely nothing to do with him and that he immediately took the appellant to the hospital. The doctor testified that he did not ask for the paper to be explained; that it was ridiculous to talk that way; that he knew what the paper was.

The captain's testimony comes very near being a confession. He admits that he told the doctor, "he is in your charge now and off from my hands," but he does not remember what circumstances called

for such a statement, but he thought it was just as he was leaving. Perhaps he would lead one to believe that as a parting salute and in the most friendly and humane manner he said, goodbye doctor, "he is in your charge now and off from my hands,"—adding—"in your charge."

The captain says he asked him point blank if he was a marine doctor and he said yes. The doctor says that he asked him, and he said no. Evidently the theory of the appellee's case is that the testimony of the captain should be believed and thereby exonerate him from all blame, and then disbelieve the captain's testimony and believe the doctor's and likewise exonerate him from blame. The most that can be said for their testimony is that the captain did not tell the whole truth and that the doctor gave false testimony and in so doing they deceive no one but themselves.

We have attempted to lead up to the main question in this case and that is, whether or not this appellee performed its duty to appellant in securing medical and surgical treatment such as the law demands.

The appellants testified:

"After that they took me up to the doctor's hospital and I got chloroformed, and they tried to fix my arm temporarily, as far as I knew. I got out of the chloroform and I recollect the captain was there. But I would not be respon-

sible to give evidence as to what happened. Well, two days after I was in bed, I was helpless, could not get up. The doctor came in the morning and piled my clothes there and wanted to know if I could get up off the bed. I told him no, doctor, it is impossible I cannot move. I says what is the matter, doctor, anything going wrong? He says no, and he went out. And I spoke to his brother the same day in the afternoon, and he told me the truth, he says we find out that the captain gave us a false statement about this piece of paper, and we can get no money from the Marine Hospital, and the sooner you get out of bed it will be cheaper for you. I explained to the doctor that by the marine law I was allowed to get a doctor and hospital and medical attendance. He said I don't know nothing about that, for to clear ourselves, we will have to look for the pay from you. Well, I was thinking about my arm. I could not get no more treatment, and I considered it best to get up as quick as possible. I asked the doctor, in case I got well enough to get up, how much the bill would be, and the doctor told me he would make it cheap under the circumstances, we will only charge you thirty dollars. I told the doctor I would put the money up but I would not pay the bill, I got a receipt for the money. On a Saturday, eight days afterwards, the nurses helped me up and get on my legs. I was able to walk around in there, but I could not sit down. I got to the hospital, to the Marine Hospital, and the doc-

tor asked me why I did not come there first. He says your arm is in such shape that I could not do anything with you. My arm was all festered. It took two months and five days before they could set my arm, before my arm was in condition to set. The first week I came to the Marine Hospital they took an X-ray picture of my arm, and the fore-bone had overlapped—

MR. SHORTS: I object as not the best evidence.

Q. Did you turn those X-ray pictures over to me?

A. You have them, yes; I turned them over with all my papers.

MR. LANDON: I will produce the pictures later.

Q. You may continue now.

A. The bone was overlapped and the arm contracted and it was about an inch shorter. And on the 8th of March I got operated on and they plated my arm bones together, and the arm was in such shape and so contracted the plate wont stand. The joints of the bone cave in. And the doctors themselves think there is a cave-in in one bone—

MR. SHORTS: I object to any statement as to what the doctors may think. The best evi-

dence would be the doctors themselves. I move to strike the statement and object to any further testimony along that line.

Q. What did they do to you?

A. The doctors?

Q. Yes.

A. They operated on me. They put plates in, silver plates. And the arm was contracted in such shape it would not stand it; it broke loose again and caved in.

Q. What did they do then?

A. It has been there ever since. I was in perfect physical health, for the abrasions healed up in eight days; there is nothing against me. I blamed the captain—

Q. You are still in the hospital there?

A. I am still there. From the 10th day of January. I got hurt the 3rd of January.

Q. Can you use your arm at the present time?

A. My arm for labor is permanently useless. I cannot lift nothing with it.

Q. How old are you?

A. Forty-one past, very near forty-two.

Q. What occupation have you been following?

A. Been going to sea all my life.

Q. And what wages were you earning?

A. Forty five dollars a month.

Q. Including board on the vessel, of course.

A. Yes. I want to add that I wrote twice down to San Francisco—

Q. What correspondence, if any, have you had with the owners of the ship?

A. There was through the Union a man representing me to the owners, Mr. Tennyson representing the ship's owners. The man who was I was helpless, I could not write; as far as that goes I could not write yet.

Q. Did you see the letters?

A. He showed me the letters, and told me that Tennyson was the representative of the ship.

Q. Go ahead.

A. The doctor in Port Angeles sent a letter to me and told me he wrote to the captain and explained the case to him. I never got the money. But he promised, on one condition, if I wanted to sign an agreement not to prosecute them and to get two witnesses to sign, and he gave me a typewritten sheet of paper to that effect. That is about all of my statement."

(Record p. 20 to p. 24).

Dr. P. I. Carter, surgeon in the Marine Hospital at Port Townsend, witness on behalf of the appellant testified: that when the appellant arrived in Port Townsend on the evening of January 11, 1913, that the whole arm to the shoulder was badly swollen and paining; that there was a two inch sloughing, an infection over the region of the fracture; both bones out of position and that the appellant had injuries to his side and shoulder; that he had an anterior and posterior splint completely over his arm; that the wound had a great deal of puss; that he cleaned out the wound and applied a light splint to the arm, leaving an opening over the wound, which allowed him to dress the wound every day and kept this up for sometime. Later on it was operated on the plates were applied. That appellant's exhibit "A" was taken on January 14th, 1913; that he would treat such a wound from the beginning by the open method, that is to say, a splint would have to be applied, an extension on to the arm; that if there was very much tenderness and pain, would probably wait, just dressing the wound and keep it clean and wait for about 48 hours or until the swelling subsided enough so that you can use an extension and apply splints that would give an extension on the arm and hold the bones in an apparent right position; to allow the wound to be cleaned and dressed every day without disturbing the

splints; have an X-ray taken to be sure the bones were in place; that at the time the appellant arrived he had just anterior and posterior wooden or felt splints; that Dr. Carter would have put on splints that would give him an extension and leave a window open so he could dress the wound. (Record p. 41 to p. 60).

Dr. W. J. Taylor, witness for appellee, testified that the appellant had a bad compound fracture; that he took him to the hospital and his brother and the nurse, the nurse being his brother's wife, gave him an anaesthetic; took off the bandages and his clothing connected with it and applied iodine to the wound; that the tissues about the wound were damaged and bruised; that the arm was swollen and very painful; that he used felt splints to hold it in place; that he noticed the infection on Wednesday.

“We took all this down, loosened them, cut the bandage down, if I remember rightly, that would make a hole down to the wound, and we put adhesive to hold it on the outside; I think that was on Tuesday following the Saturday, or Wednesday, I am not sure of that. It looked as though it were infected by the temperature going up, and we took the whole thing down and it was infected. Of course it was not the fracture we had to deal with at that time—we had to deal with the fracture, but the fracture was secondary to the infec-

tion.” (Record p. 97).

That after Wednesday he thought it would not be less than once a day that he dressed and disinfected the wound, (that is to say that he dressed the wound from the 8th to the 11, at which time the appellant left.)

“Q. Would you, after examining exhibit “A” say that is the way you would treat him permanently?

A. If I knew the condition of the arm—of course you must understand that the man had gone to Townsend. The arm as shown in the picture I will swear I did not leave the bone that way. I will swear to that that I never left that bone in that condition. You can never tell me that I would leave that that way. You understand that man had been brought over to Port Townsend from me.

Q. You do not think any good doctor would leave a bone like that?

A. Certainly not.” (Record p. 116 to p. 117).

Dr. Willis H. Taylor, testified:

Q. Did any infection set up after that in this wound?

A. Yes sir.

Q. Can you tell just how long that was?

A. I do not remember definitely, no. I remember it was two or three days after that his temperature went up, which would indicate an infection.

Q. Then what was done, if you know?

A. Why, the splints were taken down and the wound cleaned up, sterile dressing applied twice a day, if I remember.

Q. Sterile dressing applied to the wound?

A. Yes sir.

Q. Applied to the wound twice a day.

A. Yes sir.

Q. Did you assist in doing that work, doctor?

A. Yes.

Q. Who else was present if you remember, that he was dressed and taken care of that way?

A. Mrs. Taylor, my wife, and Miss Peterson, I think, was the other nurse." (Record p. 126).

Mrs. Louise Taylor, wife of Dr. Willis H. Taylor, testified for appellee to the operation and that the appellant had the ordinary nurse's care of a ward patient and that they dressed the wound every day after his temperature started, after they had left him alone for two days; "then his temperature

came up and they unbound the arm and dressed it from that time on.” (Record p. 136 to p. 137).

Appellant testified, on rebuttal as follows:

“Q. I wil ask a more specific question. State whether or not Mrs. Taylor, the head nurse at the hospital treated you?

A. I only seen her about one minute all the time I was in the hospital, that was when I was chloroformed; she was the woman that chloroformed me, and after that she never was in the room with me, not one minute.

Q. State whether or not bandages were taken off from your arm?

A. There was nothing touched my arm, no splints and no bandage during the time I was in the hospital; I never seen my arm before I came to the marine hospital.

Q. From the time you went under the operation?

A. From the time I left the ship.

Q. You never saw your arm?

A. I never saw my arm until I came to the marine hospital.

Q. Was it bandaged at the time you were under chloroform—was it bandaged when you came out of the chloroform?

A. Two splints and two bandages on it, one on top of the other; that is the way it was during all of the time.

Q. State whether or not at the time you were in the hospital there, whether any of the doctors examined your arm or doctored it in any way?

A. None of the doctors touched my arm during the time I was there.

Q. Did any one?

A. No, nobody.

Q. Who was the nurse there or party in your ward—you were down below were you?

A. There was one nurse in our room, supposed to attend to us, but she had the whole hospital to attend to.

MR. HULBERT: I object to that as an expression of opinion of the witness, and wholly incompetent and immaterial.

Q. Was she in your room some of the time?

A. She was there occasionally; she never stayed in there any time.

Q. Was this down stairs where you were?

A. Downstairs in the room; two men in the room, me and Mr. McDonald, an old man.

Q. What became of him, do you know?

MR. HULBERT: I object as incompetent and immaterial.

A. He died.

Q. When did he die?

MR. HULBERT: I object as incompetent and immaterial.

A. Twelve months ago, I was told.

Q. And this other nurse, that you speak about, not doctor Taylor's wife, but the one that was in the room there, did she do the scrubbing and looking after all that?

A. Sweeping and fixing up.

Q. Do you know where she is at the present time?

A. No, I do not know where she is.

Q. Did you try to find out where she is?

A. I have been trying all over to find her; I tried to find her from Port Angeles but could not find her.

Q. When you left the hospital how did you go down to the boat?

MR. HULBERT: I object to that as being not rebuttal; it was gone into in chief and is wholly incompetent.

A. I walked down.

Q. Now then what did you do after you got on the boat.

A. I had to stand up all the time; I could not sit down without hurting my arm.

Q. State whether or not you were careful from the time you left the hospital until you got to Port Townsend hospital.

MR. HULBERT: I object to this line of testimony because it was gone into in the examination in chief, and is not rebuttal in any sense, and therefore it is incompetent.

MR. LANDON: I think I am entitled to show what he did.

A. I had my arm in splints, bandaged and in a sling; had a sling on my shoulder, a big wide towel; the arm was lying in the towel right along and I could not hurt it any way.

Q. Anything happen at all to it?

A. Nothing happened at all to it.

Q. When you were up at the hearing when Dr. Taylor and his wife testified, did you have an X-ray taken of your arm on that date?

A. Yes sir. (Record p. 139 to p. 142).

Fondahn says that his arm was not touched at the Port Angeles hospital after he came out of the chloroform. That some two days after he went there, the doctors asked him if he could get up and go to the marine hospital, later telling him that they had found out that they had been deceived by the captain regarding the permit.

The marine doctor at Port Townsend testified as to the condition of the arm at the time of the arrival of the appellant at the marine hospital, which testimony corroborates the appellant's as to the lack of treatment while at Angeles. The Townsend doctor further testified as to what treatment would have been proper under the circumstances. The doctors at Port Angeles admit that they did not touch the arm from the time he arrived, on Saturday, until the following Tuesday or Wednesday, but claim that they treated it thereafter. They admit that if the arm was in the same condition that it was at the time Exhibit "A" was taken that it did not receive proper treatment. Fondahn's and the Port Townsend doctor's testimony shows that the bones were in the same condition when Exhibit "A" was taken as they were when he left Port Angeles.

Nowhere will it be found in the testimony, we believe, any specific statement of the Port Angeles doctors as to the treatment received. True, they

generalize and say that we, or us, treated him and that they followed the regular school and so on.

It would seem that the appellant paid for exactly what he got, namely, temporary treatment on the day he arrived at the hospital and for his subsistence during the time he was there.

This man was in charge of the appellee until he arrived at the Port Townsend hospital. He obeyed all orders and followed their directions. It was their duty to provide him with proper medical care, which of course, was not done.

The following is a letter written by Dr. Taylor to the Marine Hospital at Port Townsend:

“Port Angeles, Wash., Jan. 10th, 1913.

“Surgeon-in-Charge, Marine Hospital,
Port Townsend, Wash.:

“Dear Sir: The bearer (Mr. Fondahn) is from the S. S. Holmes and was injured while at work on that boat and left off at Port Angeles and came under our care. He has an application blank for the Marine Hospital which we are inclosing. As we have no arrangement for this class we are sending him to you as soon as it is possible to move him. As we occasionally have patients from the different boats we would be glad to know if any arrangements could be made whereby we could

treat them or administer first aid. If you would send us the information regarding this matter we would be grateful.

“In regard to patient we are sending he has a compound fracture of right arm below the elbow of both radius and ulna. We took an X-ray plate of it and by what that showed it would seem that it could not be got into position without plating. Hoping to hear from you in regard to the case and in reference to acting in conjunction with the Marine Hospital Service,

“We remain yours fraternally,

“OLYMPIC HOSPITAL.

(Signed) “Per J. W. Taylor.”

(Record p. 146).

Of course the appellant was “left off at Port Angeles and came under our care.” That is exactly what happened, “unharnessing” as it does the entire defense of the appellee.

Respectfully submitted ,

DANIEL LANDON,

Proctor for Appellant.

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IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GUST FONDAHN,

Appellant,

vs.

SCHOONER "C. S. HOLMES," etc.

Appellee.

No. **2698**

*Upon Appeal from the United States District Court
for the Western District of Washing-
ton, Northern Division.*

BRIEF OF APPELLEE

R. A. BALLINGER,
ALFRED BATTLE,
R. A. HULBERT, and
BRUCE C. SHORTS,
Proctors for Appellee.

901-907 Alaska Building,
Seattle, Washington.

FILED

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J. D. MONCKTON

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

This is an action in admiralty for injuries alleged to have been received by the libelant while he was a sailor on the Schooner "C. S. Holmes." The original libel set forth several causes of action: First, it is alleged that the accident was due to the carelessness and negligence of the captain of the vessel; second, that the captain of the vessel failed

to provide the libelant with proper medical and surgical aid, it being alleged that the captain stopped at Port Angeles and left the libelant in the hands of a doctor who was not a marine doctor, and made no arrangements to have the libelant properly cared for and treated. It is also claimed that the captain should have taken the libelant on to Port Townsend to the General Marine Hospital at that place, it being the contention of libelant that he suffered damage by reason of the failure of the captain of the vessel to place him in the hands of a competent physician and surgeon to care for his injuries and that the captain should have taken him on to Port Townsend to the Marine Hospital.

Exceptions to the original libel were sustained by the District Court, and upon appeal the Circuit Court of Appeals affirmed the judgment of the lower court as to the first cause of action, the judgment being reversed as to the second cause of action. This court said that the libel was poorly drawn, but under the rule of liberal construction given to pleadings in admiralty, the libelant should be permitted to make proof of certain allegations contained in his second cause of action. Among other things, it was alleged that: "The captain deliberately put libelant off at Port Angeles for

the purpose of getting rid of him, knowing and intending that he would at most only receive temporary relief," and that the captain tricked the doctor into accepting for his fees a permit admitting the libelant to a marine hospital, and that the doctor, upon learning that he had been deceived, and while the libelant was still in a helpless condition, requested him to leave his hospital; that "libelant was unable to move. He received no more attention or treatment for six days longer, when with considerable effort he made his way to Port Townsend." It was also alleged that blood-poison set in, and the libelant suffered from necrosis of the bone, all by reason of the captain's failure to place the libelant in the hands of a competent physician, and by reason of his deception practiced upon the doctor as well as the libelant, and that by reason thereof libelant was greatly damaged. In view of these allegations, this court said:

"For the purpose of disposing of the exceptions, those averments are, of course, to be taken as true. So taken, it cannot, in our opinion, be properly held that the vessel is without liability. Assuming the competency of the doctor at Port Angeles, the effect of the allegations is not only that he was not employed by the captain to give to the injured seaman proper medical care, but, on the contrary, that the captain gave to the doctor a written paper

informing him that 'it was good for all expenses incurred,' while at the same time well knowing that it was valueless for any purpose except that of the admission of the libelant to the marine hospital at Port Townsend, which averments are supported by the further allegation that the captain deliberately put the libelant ashore at Port Angeles 'for the purpose of getting rid of him, knowing and intending that he would at most only receive temporary relief,' and that even that was not accorded him. Of course no such tricks are sanctioned by the admiralty or any other law."

The allegations above referred to are wholly unsupported by the evidence.

Much of the Statement of libelant's opening brief is unsupported by any evidence. Some of these statements are partly sustained by the evidence of the libelant himself, but are contradicted by all the circumstances and by the positive testimony of all the other witnesses in the case, and are also contradicted in many respects by the libelant himself.

The Schooner "C. S. Holmes" is a sailing vessel. The libelant was employed as a sailor on this vessel. On the 31st day of January, 1913, this schooner was towed to sea by a tug boat. After they had reached the open sea, the libelant undertook to cut the lashings holding the tow line on

the vessel, so that the tug boat could return to Puget Sound and the vessel continue on its journey. While libelant was cutting these lashings and as the line gave way, the spring of the line caused a piece of wire cable and a steel hook attached thereto to fly back and strike the libelant's right arm between the elbow and the wrist, causing a compound fracture of both bones. The captain immediately assisted libelant. Splints and bandages were applied to the broken arm, and within half an hour the vessel was turned around and started back to Port Angeles. The tug boat was already out of sight, so it was necessary for the vessel to sail back to Port Angeles. The weather had been bad and was still bad. They reached Port Angeles about twelve hours later. There they secured the services of the Tug "Prosper" and the sailing vessel was towed into the harbor at Port Angeles. The captain of the Holmes asked the captain of the tug boat if there was a marine doctor in Port Angeles, and he was told that there was. A little later he also asked the captain of the United States vessel "Snohomish" if there was a marine doctor in Port Angeles, and he was informed by that officer that there was. After getting this information, the captain anchored in the harbor at Port Angeles and with the assistance of the officer of the United

States vessel "Snohomish," the libelant was taken ashore and Dr. W. J. Taylor was reached at about five o'clock in the morning. The libelant was taken immediately to Dr. Taylor's office, where an examination of his arm was made. The doctor found that both bones of the arm protruded through the skin. It was a very bad compound fracture. The libelant's arm was dirty and bits of his woolen shirt were in the wound. Dr. Taylor informed the libelant and the captain that it would be necessary for the libelant to go immediately to the hospital and have his arm attended to. The libelant was then taken immediately to the hospital, where he was put under an anaesthetic and his arm treated. This is all fully covered by the testimony of both doctors of the hospital and the trained graduate nurse in attendance. The doctor washed the wound with antiseptics and did everything he could to thoroughly cleanse the wound. He then set the bones and put on splints such as are usually used in the profession in such fractures. The arm was then bandaged and libelant was put to bed. He was taken care of by nurses and both Dr. W. J. Taylor and his brother, also a doctor, assisted in taking care of him. After a few days infection was noticed. Then it became necessary to take off

the bandages and splints in order to treat the infection. The infection then became the primary thing to attend to. This is the testimony of all the doctors and is undisputed. The libelant received daily attention from the doctors and the nurses from the time his arm was first treated until he went to the marine hospital eight days later.

It was understood by everybody that the libelant should go to the Marine Hospital at Port Townsend as soon as he was able to go, but Dr. Taylor and his brother treated the injury the same in all respects as if the patient was to remain in the hospital at Port Angeles permanently. Nothing was slighted, nothing was left undone that could have been done for the libelant by the best medical and surgical attention known to the profession.

When the captain of the Schooner "Holmes" left, he gave Dr. Taylor a permit that would allow the libelant to enter the government marine hospital at Port Townsend. This permit was held by the doctor until the libelant was able to go to Port Townsend. Dr. Taylor testified that this permit was not left with him for the payment of his services, nor was he deceived in any way regarding it. He expected to be paid for his services by the vessel, and the leaving of the permit with him had

nothing whatever to do with his treatment and care of the libelant but was simply left with him as custodian for the sailor, to be given to him when he was able to go to Port Townsend. Eight days after libelant was first taken in charge by Dr. Taylor, he was able to go to Port Townsend. His arm was infected, but there was no blood poisoning nor necrosis of the bone. Dr. Taylor and his assistants were dressing the wound and taking care of the infection, which then demanded the chief and primary attention under the testimony of all of the doctors. When the libelant was able to go to Port Townsend, his arm was prepared for the trip by Dr. Taylor and he was put on the boat, and in about two or three hours thereafter he was at the Port Townsend Marine Hospital. On account of the damage done to the soft tissues and to the periosteum and on account of the infection, the bones did not unite. This is the reason given by all of the doctors.

The doctors at Port Townsend pursued the same course that Dr. Taylor had been pursuing, namely, to clear up the infection before performing any further operation or making any further attempt to hold the bones in proper apposition, it being agreed that it was necessary to clear up the

infection and heal the wound before it would be safe to further wire the bones together or put on the Lane Plates, which all admitted was necessary to be done in order to get the bones to properly unite under the circumstances and the severity of the injuries to the bones and soft parts as aforesaid. After the infection was cleared up and the wound healed, the marine doctors cut down and brought the bones together with the use of *Lane Plates*, but on account of the injury to the periosteum the bones have not united perfectly. There is a fibrous union, but not a good strong bony union, and it will be necessary to perform another operation by the use of plates or wire. The doctors at the Marine Hospital have already advised this operation. The libelant is in perfect physical health. The wound in his arm has thoroughly healed and there is no indication of disease of any kind of the bone. The operation is a simple one and is usually successful, according to the testimony of all the doctors. There is no testimony that shows or tends to show that the libelant's condition would have been any better or that he would have suffered any less if he had been taken direct to the Marine Hospital in the first instance or if he had been put under the care of the marine doctors. Their treatment, according to the testimony, would have been

the same. There is no testimony that any damage resulted to the libelant by reason of any neglect or misconduct of the captain.

The libelant contends that the captain of the vessel made no arrangements with the doctor at Port Angeles to treat him, and that the captain put the libelant off at Port Angeles to "get rid of him," knowing that he would not be properly cared for and that he, the libelant, suffered by reason thereof. There is no testimony to support these charges. There were only a few witnesses testifying in the case, and we invite the Court to read this testimony with these charges in view. The testimony of both doctors at Port Angeles and the testimony of the trained graduate nurse at the hospital shows conclusively that everything was done for the libelant that could have been done for him at any first-class, up-to-date hospital anywhere in the country, not excepting the best marine hospital. It must be admitted that both Dr. Taylor and his brother are licensed practicing physicians; that there are two hospitals at Port Angeles, one of them, and the best one, is owned and conducted by Dr. Taylor. Dr. Taylor is the regular physician and surgeon at Port Angeles for the Chicago Milwaukee Railroad, for the county in which he resides,

and for several large mill companies, logging camps, and other institutions, as shown by his testimony. In addition to this, he has a large general practice and frequently cares for the sick and injured taken from the United States Government boats. He also frequently treats sailors that are taken from merchant ships at Port Angeles, and it must be admitted that he conducts a surgery as well equipped as any to be found in the State of Washington.

When the libelant left Dr. Taylor and went to Port Townsend, Dr. Taylor told the libelant that his bill was thirty dollars, and if he wanted to pay this amount he would give him a receipt for it, and that this would save the doctor the trouble of forwarding the claim to the vessel. He told the libelant that he could pay the bill, or he would get it from the company afterwards (Apostles 108). The doctor understood all the time that he was to receive his fees from the vessel, but he says he knew that the libelant had something over a hundred dollars with him and he put it up to the libelant whether he should pay him and collect from the vessel or whether the doctor should send his bill direct to the vessel, and without further discussion the libelant paid the bill.

The lower court held that the vessel should

pay forty-five dollars, the regular wage for the trip, and thirty dollars, the sum paid to the doctor by the libelant. This amount, together with costs, was paid into court and it was receipted for by the libelant in full satisfaction of the judgment.

POINTS.

1st. It was the duty of the vessel to take the injured libelant to the nearest port where he could receive medical attention.

2nd. The captain performed this duty when he put in to Port Angeles, the nearest port (by some 6 or 8 hours) and exercised reasonable care in engaging a competent physician and surgeon.

3rd. It was the duty of the captain to exercise reasonable care in placing the injured libelant under the care of a competent physician where he would receive competent medical and surgical aid.

4th. The captain performed this duty when he placed the libelant under the care of Dr. Taylor and his brother, who were conducting a hospital at Port Angeles and were thoroughly equipped to give to the libelant every attention and skill and up-to-date treatment.

5th. The testimony clearly shows that Dr. Taylor and his brother were competent, skilled, and experienced physicians and surgeons.

6th. The testimony also shows that Dr. Taylor and his brother gave to the libelant proper attention and treatment; that they were not guilty of any neglect or malpractice in any degree; that the libelant received the same kind of care and the same treatment recognized by the profession and the kind that he would have received at the hands of the best physicians anywhere to be found.

7th. The injuries to libelant's arm, and especially to the bones and the periosteum, were so severe that the proper union was retarded and prevented; that the failure of the bones to unite was not due to improper treatment, but was due to the severity of the injury, the damage done to the soft tissues and to the periosteum and the infection, all of which resulted in spite of the doctors' efficient treatment.

8th. The infection that followed was not due to the treatment, but came in spite of skilled and competent treatment, and the use of all the antiseptics known to the profession.

9th. It is agreed by all the doctors that infection

would be most likely to follow such an injury, and that when it appeared it became the primary thing for attention; the fracture of the bones became a secondary matter; that nothing further could be done in the way of uniting the bones until the infection was first taken care of and cleared up. The marine doctors pursued the same method and course of treatment that Dr. Taylor and his brother were pursuing at the time the libelant left their hospital to go to Port Townsend, namely, treating the infection and waiting until the wound was healed before an attempt was made to put on plates or wire the bones, that became necessary on account of the injury to the bones and the periosteum and soft tissues.

10th. The question as to whether Dr. Taylor was a marine doctor or not is immaterial in view of the fact that he was a skilled and experienced physician and surgeon, and followed the same method and the same treatment prescribed by the profession generally, and the same that would have been followed by any competent marine doctor. The question as to whether the captain made a definite agreement to pay Dr. Taylor for his services is immaterial in view of the fact that Dr. Taylor accepted the patient and looked to the vessel for

his pay and expected the vessel to pay him, and gave the libelant competent treatment and treated him in all respects the same as if he were going to remain with the Doctor in his hospital permanently. No different arrangement; no promise nor payment of money in advance, would have made any change in the efficient care and treatment given the libelant.

11th. Even if it had been shown in the evidence that Dr. Taylor had been guilty of malpractice, yet the respondent would not have been liable, for the reason that it performed its full legal duty when the captain used reasonable care in engaging the services of a competent physician and surgeon. It is not contended that Dr. Taylor was not a competent and skilled physician and surgeon, nor is it contended that the hospital was inadequate. The testimony is overwhelming to the effect that everything was done for the patient that could have been done and that the captain lost no time in getting him into the hands of competent and experienced physicians and surgeons, where he received the best of attention.

12th. The captain would have been derelict in his duty if he had undertaken to have carried the libelant in his then condition on to Port Townsend,

which would have delayed treatment for many hours and might have resulted in a case of gangrene or other serious complications. If the captain had not put in at Port Angeles, clearly the vessel would have been liable for any damage that the libelant would have suffered by reason of the delay in securing medical attention.

ARGUMENT AND AUTHORITIES.

The only question left in the case now is whether or not the captain discharged the duty of the vessel in furnishing surgical and medical care for the libelant, and whether or not the libelant was injured by reason of any neglect of the captain. All of the assignments of error in this case go to these questions.

A mere casual reading of the evidence will show that the captain exercised reasonable care and performed his whole duty towards the libelant and that the libelant was properly cared for and suffered no damage by reason of any neglect on behalf of the captain or the treatment he received from the doctors to whom he was taken by the captain.

Let us review briefly the testimony in the case. As soon as the libelant received his injury, the undisputed testimony shows that Captain Thompson immediately put splints and bandages on the broken arm and did everything that he could to relieve the libelant. As soon as this was done he went on deck and personally supervised the turning of the vessel back from the sea towards Port Angeles, the nearest port. The tug which had taken the vessel out to sea had already disappeared, so that it was necessary for this sailing vessel to get back into Port Angeles by sailing. When they neared the harbor a tug came out, and the captain asked if there was a marine doctor in Port Angeles. The captain of the tug told him that there was. He then secured a small tug to tow the vessel into the harbor. Captain Thompson then talked with an officer on the United States vessel "Snohomish," and was informed by this officer that there was a marine doctor at Port Angeles—at least a doctor who did marine work. It had taken the vessel about twelve hours to get back to Port Angeles. Every consideration demanded that the captain get him into the hands of a physician and surgeon as soon as possible. Libelant was taken ashore immediately and the captain, with the assistance of

others, got in touch with Dr. Taylor, who had been recommended to him by the officers of the other vessel there. It was five o'clock in the morning. Dr. Taylor was gotten out of bed. The libelant, together with the captain, and the officer from the vessel "Snohomish," walked up the street, met Dr. Taylor, and from there went to Dr. Taylor's office, where the arm was examined and from there the libelant was taken immediately to the Olympic Hospital—the best hospital in Port Angeles, which was then being conducted by Dr. Taylor and his brother. The libelant was there put under an anaesthetic and Dr. Taylor, with the assistance of his brother and a trained graduate nurse, dressed the arm. In doing this work Dr. Taylor used and followed the methods known to and recognized by the profession and brought the bones in perfect apposition, sewed up the muscles and soft tissues to cover the bones, and put on splints and bandages to hold the bones in place, hoping that infection would not appear and that the bones would unite. Antiseptics were used and every precaution was taken against infection.

The only theory upon which libelant can recover in this case is that the captain of the vessel, acting for the owners, violated some legal duty and that

the libelant was damaged by reason thereof. If the captain performed his legal duty, there of course can be no recovery in the case, no matter how badly the libelant was injured nor how much he has suffered. And even if the captain did violate his duty in any particular, and the libelant did not suffer by reason thereof, then of course there can be no recovery. We have read the testimony carefully and have been unable to find any evidence sustaining the proposition that the captain violated any duty that he owed to the libelant. It is also impossible to find any evidence showing that the libelant suffered any damage by reason of any act of the captain. We have read libelant's brief and looked through it in vain to find just how and in what manner it is claimed that the libelant sustained any damage by reason of anything that the captain did in violation of his duty.

It was the duty of the captain on behalf of the ship after the accident to take the libelant to the nearest port where medical and surgical aid could be secured. It will be admitted that Port Angeles was the nearest port. If a physician and surgeon could be secured at Port Angeles, then it was the duty of the captain to stop there and secure the services of such physician and surgeon. The

captain, upon inquiry, found that there was a competent physician and surgeon at Port Angeles. He stopped there and put the libelant in the hands of this physician and surgeon who properly treated him. If the testimony of both the doctors and the trained nurse can be believed, then the libelant was properly treated and everything was done for him that could have been done. Certainly the captain did exactly the right thing in stopping at Port Angeles and not taking a chance of further delay, which might have resulted in serious suffering and injury to the libelant.

The captain of a vessel is not bound to take an injured sailor to a marine hospital or to a marine doctor. Counsel for libelant in his brief seems to insinuate that it was the duty of the captain to take the libelant on to Port Townsend to the marine hospital and to the marine doctors located there, but this was not the legal or moral duty of the ship. On the contrary, it was the clear legal duty of the master to put into Port Angeles, where the libelant under all the circumstances could be treated by a physician and surgeon at the earliest possible moment. In fact, if the captain had continued on to Port Townsend and the libelant had suffered on account of the delay, then the ship would have

been clearly liable for the damage sustained by such delay, if it had been shown that there was a physician and surgeon at Port Angeles that could have been secured.

In the case of *The Troop*, 128 Fed. 865, the libelant claimed damages by reason of the fact that the master carried him past Port Angeles on to Port Townsend, thereby causing unnecessary delay in securing treatment.

It took the sailing vessel twelve hours after the accident to reach Port Angeles. The libelant was badly injured. It was necessary to get him to a doctor as soon as possible. If they had carried him on to Port Townsend, the libelant might well have contended that if he had received aid at Port Angeles, the results would have been better.

Under all the authorities, the captain performed his full legal and moral duty when he put into Port Angeles as quickly as he could and there secured the services of a physician and surgeon for the libelant.

Counsel in his brief says that the captain gave as one of the reasons why he did not go to Port Townsend, that it would cost the ship one hundred dollars more than it would to go to Port Angeles. The captain gives his reason for going into Port Angeles as follows:

“Q. Now why did you put into Port Angeles instead of continuing down to Port Townsend?

A. I did that simply because it was 12 hours after the accident when we arrived at Port Angeles, and I knew the man's arm was in bad shape, and it was up to me to get him to the nearest doctor. If I had kept on and gone to Port Townsend we probably would have got there late in the afternoon, and it would have been so much further, so much longer time, and his arm was in bad condition without medical attendance.

Q. Did you believe that you could get proper treatment from the marine doctor at Port Angeles when you put in there?

A. I certainly did. The man being a regularly licensed doctor the man should get good treatment. Besides, the law says, I believe, that I should go to the nearest doctor.”

The captain admits that he also considered the expense. He had a right to do this; but it is clear from his testimony that his primary and first thought was to get the injured man to the nearest doctor.

In the case of *Iroquois*, 194 U. S. 240 (48 Law Ed. 955), the court said:

“Each case must depend upon its own circumstances, having reference to the seriousness of the injury, the care that can be given the sailor on shipboard, the proximity of an intermediate port, the consequences of delay to the interests of the shipowner, the direction of the wind and the probability of its continuing in the same direction, and the fact whether a surgeon is likely to be found with competent skill to take charge of the case. With reference to putting into port, all that can be demanded of the master is the exercise of reasonable judgment and the ordinary acquaintance of the seaman with the geography and resources of the country. He is not absolutely bound to put into such port if the cargo be such as would be seriously injured by the delay. Even the claims of humanity must be weighed in a balance with the loss that would probably occur to the owners of the ship and cargo. A seafaring life is a dangerous one, accidents of this kind are peculiarly liable to occur, and the general principle of law that a person entering a dangerous employment is regarded as assuming the ordinary risks of such employment is peculiarly applicable to the case of seamen.”

The captain exercised his best judgment, and it will be conceded that he took the libelant to the nearest port and nearest doctor.

It was the duty of the captain to exercise reasonable care in selecting and securing a competent physician and surgeon to care for the libelant. A casual reading of the testimony in this case will show that the captain exercised such care. As soon as the sailor was injured, the captain turned back to port. He asked the captain of the first tug that they met if there was a doctor at Port Angeles, and was told that there was. He then inquired of the captain of the next tug that he met and also of an officer aboard the United States ship "Snohomish." They all told him there was a doctor at Port Angeles. In addition to this, the fact remains that Dr. Taylor and his brother are competent physicians and surgeons. The undisputed testimony shows that there are eleven doctors in Port Angeles and two hospitals. Dr. Taylor owns one of these hospitals. The hospital is equipped with all the modern appliances and conveniences for medical and surgical treatment. The operating room is as well equipped as any modern operating room to be found in any of the hospitals in the State of Washington. Dr. Taylor so testifies, and if this were not true, counsel for libelant, who visited the place, would be on hand with testimony to dispute the doctor's assertions. Dr. Taylor is a regularly licensed physician and surgeon. Dr.

Taylor does medical and surgical work for the County of Clallam, several large mill companies and railroad companies. The doctor testified as follows:

“A. I am the appointed surgeon for the Milwaukee Railroad there. I received that appointment when the Milwaukee took over that railroad the first of January last. I am the Milwaukee surgeon under Dr. Bouffleur, of Seattle. I have a contract as doctor for the Port Crescent Shingle Mill Company; the Howell, Hill & Ray Shingle Mill; the Hanson, Ballard, Shingle and Sawmill and the Merrill Mill Company. Besides that, I have a contract with the county to do the county poor work; that is, my hospital has that, the county poor work, we have a contract for that. Also with the Erickson Construction Company while they are building roads there.

Q. You attend to all the surgical and medical work for the county and for these various companies?

A. Yes sir.

Q. Including the railroad and besides your general practice?

A. And my general practice.”

The captain not only exercised reasonable care in his inquiries about a doctor, but he actually obtained a competent and skilled physician and surgeon and an up-to-date hospital for the libelant, and it is not even contended now by the attorney for the libelant that the captain did not perform

his duty in this regard. When the captain exercised reasonable care in securing the services of a competent physician and surgeon, the ship is not liable for the results, nor for malpractice or mistake of the doctor.

Campbell v. Frank Gilmore, 43 Fed. 318;
Union Pacific Ry. Co. v. Artist, 60 Fed. 365;
Laubheim v. Netherlands Steamship Company, 13 N. E. 781.

In the last mentioned case the court said:

“If, by law or by choice, the defendant was bound to provide a surgeon for its ships, its duty to the passenger was to select a reasonably competent man for that office, and it is liable only for a neglect of that duty. *Chapman v. Railway Co.*, 55 N. Y. 579; *McDonald v. Hospital*, 120 Mass. 432; *Secord v. Railway Co.*, 18 Fed. Rep. 221. It is responsible solely for its own negligence, and not for that of the surgeon employed. In performing such duty, it is bound only to the exercise of reasonable care and diligence, and is not compelled to select and employ the highest skill and longest experience.”

In addition to all this, the libelant was properly treated by Dr. Taylor and his assistants, and received no injury or damage by reason of such treatment. The libelant received a very severe injury. Dr. Taylor testified as follows regarding the condition of the injuries:

“A. Why, he stayed there in the office—if I remember rightly he was bandaged up to some extent, when I looked at his arm, casual observation, I noticed that he had a bad compound fracture, and he was suffering considerable pain, and I managed, in the meantime, to get a fire lighted. It was quite cold, and I got the office warm, and then I examined him, and told him he would have to have some care taken and that he would have to go to the hospital.

Q. Did you then take him to the hospital?

A. Yes, as soon as I could get him there I sent him to the hospital.

Q. Now, what did you do at the hospital with him?

A. We took him there and I got my brother and nurse—the nurse was my brother’s wife at that time, and I gave him an anaesthetic, took off the bandage and his clothing connected with it, and washed all around the arm and saw the condition of it.

Q. What was the condition of it?

A. The condition proved to be a fracture of both bones of the fore arm, a compound fracture; the skin was broken and the muscles were broken, the bones were sticking out.

Q. What was the condition of the muscles and soft tissue about the wound where the bones had protruded, as to whether or not they were damaged?

A. Well, they were all broken, severed and damaged very much; it was not a matter of how much cutting, but how much damaged and bruised.

Q. Jammed?

A. I would not call it jammed. It was bruised and broken.

Q. What condition were the bones in, or did you see them then?

A. Both bones were sticking out, and it was a ragged break.

Q. How did the bones appear to be damaged, if you know, or did you make a close examination?

A. I do not catch your meaning.

Q. Well, was it a clean break?

A. I understand now. No, the breaking, if you take a break like that (indicating with lead pencil) sometimes you would get a break, come down to ends, be concisive. In this the ends were broken and destroyed the covering of the bone, the periosteum was broken and torn along the ends both ways. It was about as bad a break as a person would want to see. I call it a very bad fracture. The periosteum was shattered and also the muscles; the periosteum, the covering of the bone, was broken and turned back.

Q. Now let me ask you, what effect would that have on the union of the bones, do you think?

A. It would retard the union.

Q. Would make the union of the bones more difficult, would it?

A. Yes sir.

Q. Now, how was he dressed when you first met him?

A. He had on rough, heavy clothing, rough, heavy shirt.

Q. Like the ordinary sailor?

A. Like the ordinary sailor would have. And the clothes were very dirty, and his arm was also very dirty. At the time we got him up there, there were bits of the shirt where the break was in the cut and in the wound."

The periosteum was badly damaged and stripped back from the ends of the bone. This, according to the undisputed testimony of the three doctors in the case, together with the infection, prevented the bones from properly uniting. There is not a word of testimony in the record that pretends to show that anything Dr. Taylor did or omitted to do prevented the bones from properly uniting, and even if this were a case brought direct against Dr. Taylor for malpractice, there is not a word of testimony anywhere in the record that would sustain a right of recovery against the doctors. In treating the libelant, Dr. Taylor followed the usual methods and practice of the profession generally. It is not contended that he did not do so, and no evidence is offered to show that the treatment that Dr. Taylor and his brother gave to the libelant was not the usual treatment and the usual method followed by the profession generally in like cases. Dr. W. J. Taylor testified as follows:

“A. Well, I do not know that it is necessary to tell you, but I have had practice doing this kind of work almost all the time. We followed the general way of doing that; washed it thoroughly with antiseptic soap, got all the dirt and fragments out of the wound. We did that first, cleaned all the arm, removed all the clothing, all the shreds from it, and got it good and clean. We took him to our surgery, our operating room, and we have an operating room equal to any in the state of Washington. We took him there, got him clean; applied iodine all in the wound; then I sewed up the muscles as best I could—adapted the bone the best I could, and got the wounds together and put on a dressing of splints, felt splints to hold it in place, and left it there, and it would have healed up if there had been a union; if not, then I would conclude something else had to be done.

Q. Was the arm badly swollen?

A. Yes, the arm was swollen.

Q. Was it painful?

A. Very painful.

Q. Now what did you do in the way of extensions, if anything?

A. There is a recognized splint that you put on for that. We put on splints that go to the elbow and hold it that way, just hold it with splints; I never heard of anyone putting a weight on. We put on that kind of a splint.

Q. Were the splints you put on up against the big part of the arm?

A. Yes sir.

Q. And then bandaged to the splint that makes the extensions?

A. Yes. Then, of course, if the arm got very painful, this had to be taken down again.

Q. The arm swelled up badly?

A. Yes, very, very badly.

Q. Was there any infection?

A. We took all this down, loosened them, cut the bandage down, if I remember rightly, that would make a hole down to the wound, and we put adhesive to hold it on the outside. I think that was on Tuesday following the Saturday, or Wednesday, I am not sure of that. It looked as though it were infected by the temperature going up, and we took the whole thing down and it was infected. Of course it was not the fracture we had to deal with at that time—we had to deal with the fracture, but the fracture was secondary to the infection.

Q. Now what do you mean by that, doctor?

A. I mean that the fracture has to be dealt with to get it healed up, but that the infection which came there,—it came, I do not know what the cause of it was, but that infection had to be eliminated before we could get the bone to heal.

Q. Then what did you proceed to do, so far as the infection was concerned?

A. Dressed and disinfected the parts filled with pus.

Q. How often did you dress and disinfect the wound—did you notice the infection on Wednesday, I think you said?

A. Well, I think it would be not less than once a day.

Q. It would not be less than once a day?

A. No. Of course I will explain this, of course the flesh had all been bruised and it had lost its vitality and when once infection had started that had to slough there was no vitality for that part of the arm, and it would slough and cause pus and infection.

Q. Now was it possible to reduce the fracture until you got rid of that infection?

A. Might reduce it but you could not get it to heal.

Q. What would be then a recognized method, in your profession, for treating that arm, from that time on?

A. To get it in as good a position as possible, get the bones in as good position as possible and treat the infection and get rid of the infection, apply dressings for that and also the swelling, which was great."

Dr. William H. Taylor testified as follows regarding the treatment of the libelant:

"A. He was taken to the surgery and given an anaesthetic. There was a splint and dressings, if I remember right, and that was taken off and revealed a wound of the forearm, a circular wound, about one and a half or two inches in diameter, through which both bones were protruding, and it showed a very ragged wound, the muscles were torn and the periosteum torn back from the bones, a very ugly looking wound. The arm was washed with antiseptic soap and solutions, and the pieces

of cloth and one thing or other that had worked into the wound were picked out and the wound bathed with iodine; the bones put back in position and dressings applied; splints applied and put back to bed.

Q. Now, what was the nature of the splints applied?

A. The usual splints, both kinds, anterior—what we call an angular splint, it comes down this way, from the upper part of the arm and comes down here, and is tied up here, and gives a pull, an extension to the arm.

Q. Do you know whether there was any particular name for that method?

A. It is just called anterior right-angular splints.

Q. In use by the profession?

A. In use by the profession for that kind of injury.

Q. You put the bones in proper position, did you?

A. Yes, the wound was open and they were put back in proper place, you could see them.

Q. And then, what, if anything, was done? Was there anything done with the muscles?

A. The muscles were torn and were all sewed up and the membranes.

Q. Did they make a covering over the bone?

A. Yes sir.

Q. And then you say he was put back to bed?

A. Yes sir.

Q. What care did he have when you put him to bed, what attention or care did he have after that time?

A. Well, he had the usual care passing the anaesthetic a nurse had to stay with him two or three hours, until he came out from the anaesthetic, to see that he kept the arm still, and see that he was all right. After that he was visited once or twice a day.

Q. By the doctor?

A. Yes sir.

Q. How were you equipped there as far as nurses were concerned to take proper care of patients?

A. Trained nurses.

Q. Were there trained nurses around Fondahn during his stay in the hospital.

A. All the time, yes sir."

Mrs. Taylor, a trained nurse (the head nurse at the hospital at the time), testified as follows:

"A. He was brought from down town and put into a ward and a trained nurse gave him a bath before he was taken to the surgery, because he was very dirty, and he had a night gown put on him and was taken to the surgery and I administered the anaesthetic.

Q. Who else was present?

A. Oh, the other nurse, Miss Peterson, and two doctors.

Q. Your husband and Dr. W. J. Taylor?

A. Dr. W. J. Taylor.

Q. Now, just what was done?

A. Well, the wound was washed with antiseptics, and iodine was put into the wound, and the bones, the fracture was set, and the muscles were sewn, sterile dressing put on and then the splints.

Q. Can you describe these splints, Mrs. Taylor, to us?

A. Well, it had an inner splint, on the inside of the arm above the elbow, and then two splints before the elbow, running from the elbow to the wrist; then he had another splint on the bottom of his hand to hold his fingers out.

Q. Now was this splint above, did it come back against the—

A. The inner part of the arm.

Q. Back against the inner part of the arm?

A. Yes sir.

Q. Now do you know what is called extension splints in that kind of treatment?

A. Yes sir.

Q. Were these the usual kind that were used?

A. Yes sir.

Q. Then, what if any bandages were put on?

A. Well, just cotton and bandages to hold the splints in place.

Q. For the purpose of holding the arm in place?

A. Yes sir.

Q. Now then what was done?

A. He was taken downstairs and put to bed.

Q. And what care did he receive after that time?

A. He had the ordinary nurse, care of a ward patient.

Q. And what attention did the doctors give him?

A. Well, they dressed him every day after his temperature started, after they had left him alone for two days, then his temperature came up and they unbound the arm and dressed it from that time on.

Q. Was the infection then in the arm?

A. Yes sir.

Q. Did you, as head nurse, see him there every day?

A. Yes sir."

All of the testimony shows that the libelant was treated in the usual way and that everything was done for him that could have been done by any doctor in any place. It is true that the libelant himself testified that nothing was done for him, but it will be noticed that his testimony is very contradictory. In some places he will admit that certain splints and bandages were placed upon his

arm, and in other places he denies it. At any rate, his testimony in this regard cannot be given very serious consideration, in view of the testimony of the head nurse and the two doctors, who were disinterested witnesses in this case. Besides that, it is very unreasonable to suppose that this man would remain for eight days in a hospital and under the care of these doctors and nurses, without something being done for him in the way of treating his wound and reducing the fracture. The very purpose of putting the libelant under an anaesthetic, which he admits was done, was to dress the wound and reduce the fracture, all of which, of course, was done, just as testified to by the doctors and the nurse in charge.

All of the doctors, including Dr. Carter, who was called by libelant, testified that the reason the bones did not properly unite was because of the damage to the periosteum and the infection. The damage to the periosteum was caused by the severity of the injury. The infection followed almost as a matter of course on account of the condition of the wound and the condition of the sailor's body and clothing at the time of the accident. Dr. Carter and the other doctors testified that infection frequently occurs when an operation is performed at the hospital, where all of the precautions can

be taken against it, and that infection is much more likely to set in in case of a compound fracture, where the bones protrude through the skin, and dirt and bits of clothing are carried into the wound, and especially where the injured party remains in this condition for many hours before he is able to receive surgical treatment. Under the great weight of authority, if a doctor follows one of the well recognized methods of treatment in his profession and brings to the case reasonable care, he cannot be held responsible for the results, even though some different treatment might have proved more beneficial.

In the case of *Lorenz v. Booth*, 84 Wash. 550, which was a case brought for malpractice, the doctor in charge adopted the Lane method of cutting down and reducing the fracture of the bones, by the use of the Lane Plate. Infection set in and the result was bad. On the question of method, the court said:

“The most that can be said of this testimony in support of appellant’s contention that respondent was negligent in adopting the Lane method, is that such method did not have at that time the unanimous approval of the medical profession. However, according to the only evidence here presented in appellant’s behalf, that method did have the approval of at least

a respectable minority of the medical profession, who recognized it as a proper method of treatment. This, we think, is enough to absolve respondent from negligence, so far as his mere use of that method is concerned, there being no showing that he exercised other than his best judgment in choosing that method." Speaking of the infection, the court said:

"So we have nothing of a substantial character which would lend support to appellant's claim of negligence on the part of the respondent resulting in the infection, other than the bad result, in other words, the mere fact that the infection occurred. In *Peterson v. Wells*, 41 Wash. 693, 84 Pac. 608, this court recognized the rule that a mere 'bad result' is not of itself ordinarily sufficient to render an attending physician liable for negligence, that is, it is not ordinarily of itself proof of such physician's negligence. *Hoffman v. Watkins*, 78 Wash. 118, 138 Pac. 664; *Wurde mann v. Barnes*, 92 Wis. 206, 66 N. W. 111."

In the case of *Wells v. Ferry-Baker Lumber Company*, 57 Wash. 658, following the general authority, both in the federal and state courts, the court says:

"A physician and surgeon by taking charge of a case impliedly represents that he possesses, and the law imposes upon him the duty of possessing, reasonable skill and learning. He is not liable for mistakes if he uses the method recognized and approved by those reasonably skilled in the profession. He does not under-

take to effect a cure or restore a broken limb to its normal condition. If he treats the injury with a reasonable degree of skill and care, he is not responsible for the results."

In the case of *Hoffman v. Watkins*, 78 Wash. 118, the court said:

"Instructions were also requested by appellant, and refused, to the effect that negligence could not be inferred nor presumed from the failure to effect a cure, and that the condition of respondent's shoulder subsequent to appellant's treatment, did not of itself establish an inference that appellant had been negligent in his treatment. Such is the law, and the jury should have been so instructed."

Wood v. Barker, 13 N. W. 597;

Sims v. Parker, 41 Ill. Appeals 284;

Lawson v. Conaway, 16 S. E. 564;

30 Cyc. 1584.

So, in the case at bar, the fact that the bones did not unite, and that the wound became infected, under all the circumstances is not proof of negligence on the part of the doctor. The reason that the bones did not properly unite is clearly given and explained by all of the doctors, and as stated before, even if this case were brought directly against Dr. Taylor for malpractice, there is not a scintilla of evidence in the case to support the

charge. But in this case the duty of the ship was fulfilled when the captain exercised reasonable care in obtaining the services of a competent physician.

In *Union Pacific Railway Company v. Artist*, 60 Fed. 365, the court said:

“It would be a hard rule, indeed—a rule calculated to repress the charitable instincts of men—that would compel those who have freely furnished such accommodations and services to pay for the negligence or mistakes of physicians or attendants that they have selected with reasonable care. No such rule has ever prevailed in this country. The rule is that those who furnish hospital accommodations and medical attendance, not for the purpose of making profit thereby, but out of charity, or in the course of the administration of a charitable enterprise, are not liable for the malpractice of the physicians or the negligence of the attendants they employ, but are responsible only for their own want of ordinary care in selecting them. *McDonald v. Hospital*, 120 Mass. 432; *Insurance Patrol v. Boyd*, 120 Pa. St. 624, 647, 15 Atl. 553; *Van Tassell v. Hospital*, (Sup.) 15 N. Y. Supp. 620, and note; *Glavin v. Hospital*, 12 R. I. 411; *Laubheim v. Steamship Co.*, 107 N. Y. 228, 13 N. E. 781; *Secord v. Railway Co.*, 18 Fed. 221; *Richardson v. Coal Co.*, (Wash.) 32 Pac. 1012.”

Simmons v. Hamilton Logging Company, 76 Wash. 370;

Rogerson v. Carbon Hill Coal Company, 10 Wash. 648;

Halver Engirbritson v. Tri State Cedar Com-

pany, vol. 49, Wash. Dec., 91, in which the court said:

“There is no contention in this case that the respondent did not exercise reasonable care in the selection of a surgeon and hospital. The respondent was, therefore, not liable for malpractice, if there was any. We are satisfied that the trial court should have directed a verdict in favor of the defendant upon the motion of the defendant before the case was submitted to the jury. The judgment notwithstanding the verdict was therefore properly granted.”

It is contended by libelant that the captain did not make definite arrangements for the payment of Dr. Taylor, and he tries to make a great deal of an apparent difference in the understanding of Dr. Taylor and the captain as to whether Dr. Taylor was a *marine* doctor or not. Apparently the captain thought that he was placing libelant in the hands of an emergency marine doctor, while Dr. Taylor understood that the captain left the libelant there for immediate treatment and the ship would pay him for his services. This misunderstanding, if there was one, did not affect the treatment libelant obtained and of course becomes immaterial. The captain did place the libelant in the hands and

under the care of a competent and skilled physician and surgeon. He did receive proper treatment from this physician and surgeon. The doctor understood that he was to receive his pay from the vessel, and proceeded accordingly. No promise and no different or more definite arrangements for the doctor's pay would have made a particle of difference in the treatment the libellant received. He received the best. But in view of what counsel has said, we desire to call the court's attention to the following:

In the first place, the captain asked the officers of two tug boats and the captain of the U. S. vessel "Snohomish" if there was a marine doctor at Port Angeles, and they all told him that there was. When he met Dr. Taylor he asked Dr. Taylor if he was a marine doctor. The captain says he understood him to say that he was a marine doctor. Dr. Taylor, however, says that he told the captain that he frequently did emergency marine work, but that he was not a regular marine doctor. The testimony shows that there are marine doctors stationed at many small places on Puget Sound, and along the coast, and in some places the government has engaged the services of private practitioners to do emergency work, and Dr. Taylor has done emergency work for the government at Port Angeles,

as shown by the undisputed testimony. So, under all the circumstances, the captain undoubtedly thought that he was placing the libelant in the hands of a marine doctor, and he left a permit with the doctor to admit the libelant to the Port Townsend Marine Hospital as soon as the libelant was able to go there.

On the other hand, Dr. Taylor understood that he was to treat the libelant and receive his fees from the vessel. Upon the question of fees, the doctor testified as follows:

“A. If I may explain to the Court, this was in the morning, six o'clock, there was the man sitting in my office; he was suffering awful pain; the man got up and walked and then had to lie down. I gave him something to ease his pain, morphine, the man was in very great pain. I had to get him relieved as quick as I could, and there was no bartering there.

Q. Was there any discussion about fees?

A. No, I was not in a position, having a man suffering, I was going to do that emergency work while I could. I have these cases frequently from ships and from the woods there and I never stop, I cannot stop to barter with a man about the pay. This man, you understand, had a very severe case. He was in a bad way.”

And on cross-examination, the doctor testified as follows:

“A. No sir. The first reference to pay, if you wish me to tell you that, was when Fondahn was leaving. He left on Saturday. Fondahn had with him a hundred and some dollars which I deposited in the bank, and I told Fondahn that the way I did with these cases off merchant ships, not off government ships, that the captain or the man himself had always paid me and I gave him a receipt so that he could collect it from the company or wherever he could.

Q. Nothing else said either way about it?

A. And he had the money with him, and if he would do that it would save me a lot of trouble, and he would be closer to the people than I would, and there was not a word about it and he agreed to it.

Q. The captain made no arrangements whatever?

A. Nothing whatever. The captain could not have been there at the end of the service, and as I told the man he could pay me or I would get it from the company afterwards.”

And again, the doctor testified as follows:

“A. I told him what the charges of the case would be, that that was as little as I could make it, thirty dollars, and if he would pay me the thirty dollars I would give him a receipt for it and he could collect it probably much easier than I could and quicker. To which he made no objection whatever. He says I will pay you and take a receipt, and put the receipt in on the case. I did not know what he meant—probably that the company would pay it.”

All of this testimony is undisputed, and it is very clear that the question of whether or not Dr.

Taylor was a *marine* doctor or whether any definite arrangement was made for the payment of his fees or not, had nothing to do with the method or extent of the treatment libelant received. Counsel on cross-examination tried to get Dr. Taylor to state that his treatment was merely temporary, but Dr. Taylor testified as follows:

“Q. You only pretended to treat him temporarily, to give him temporary treatment?

A. Temporary treatment until he was able to go to Port Townsend. But you will understand that that treatment would be the same as if I was going to treat him permanently.” Later, the doctor testified as follows:

“Q. Was that treatment any different in any degree or in any particular from the treatment that you would have given the man if he was going to stay with you right there?

A. Absolutely not.”

The doctor also testified that the question of fees had absolutely nothing to do with his treatment. He testified as follows:

“Q. One more question. Whatever might have been the circumstances of a man coming there, or whatever may have been said at the time that he was left with you, or whether or not arrangements were made regarding your fees, did that make any difference with your treatment of this man?

“MR. LONDON: I object as calling for a conclusion and leading.

A. No sir. Whether I were paid or not, my treatment would be the same, because, if you will let me explain further, you get emergency cases and you do not know whether you will ever get paid. Whether from the boats or street or woods, we treat them all the same, the best treatment.

Q. Now was there anything omitted in the treatment of this man that you would have given him if there had been any different arrangements made at the time he was left there?

A. No sir.”
And he further testified:

“Q. Now did the fact that you knew that he was going to the Marine Hospital, and that Mr. Fondahn knew that he was going there as soon as he was able, affect your treatment of the man in any way?

A. No sir.”

So, from the testimony of all the physicians, it is clear that Mr. Fondahn, the libelant, was taken to a competent and skilled physician and surgeon, was given competent surgical and medical and hospital treatment, and was sent to the Marine Hospital as soon as he was able to go.

Another very immaterial matter that has been extensively discussed by counsel is the question of the permit given to the doctor by the captain of

the vessel to admit the sailor to the Marine Hospital. But what is the use of arguing this question? It had absolutely nothing to do with libelant's treatment. It had nothing to do with the accident and cannot be material in any sense. If the allegations of the libel were true, namely, that the captain deceived Dr. Taylor by telling him that the permit would enable Dr. Taylor to get his pay for attending the libelant and that after the captain was gone Dr. Taylor discovered that he had been deceived, and for that reason refused to treat and care for the libelant, then there would be something in this question of the permit, but in view of the facts in the case, it becomes absolutely immaterial.

There is not a word of the testimony that tends to show that the libelant would not have sustained at least the same amount of damage, if he had been taken direct to the Marine Hospital at Port Townsend—it may be that he would have suffered a great deal more. The delay might have caused gangrene in the wound or necrosis of the bone. The testimony shows clearly that the bone is not now infected, as alleged in the libel. The wound is completely healed, and from the statements of the doctors, all that is now necessary is to perform another oper-

ation, and wire the bones together. Dr. Carter, according to his own testimony, continued doing just what Dr. Taylor was doing, namely, to clear up the infection and heal the wound before cutting down to wire the bones or put on Lane Plates. All of the doctors agree that as soon as the infection appeared, the primary and first thing to do was to clear up the infection. This Dr. Taylor was doing at the time the libelant went to Port Townsend. When the libelant reached Port Townsend, Dr. Carter and others there held a consultation and pursued the same course that Dr. Taylor had been pursuing, and as soon as the infection was cleared up and the wound was healed, they cut down and put on Lane Plates, but on account of the damage to the periosteum, the bones did not properly unite, and another operation is necessary. But no one is to blame for this. It is one of the conditions to be expected to follow from such a severe injury to the bone, the periosteum and the soft tissues. We have in this case a severe unfortunate injury, and, up to the present time, a poor recovery, but it has been from the start one of those unfortunate things over which no one had control and for which no one is to blame.

There are many statements in libelant's brief

that we will not refer to. The testimony is short, and we presume that the court will read it. In doing so, it will be quickly ascertained that many of these statements and conclusions made by counsel are wholly unwarranted under the testimony.

Counsel refers to the testimony of Dr. Carter, the marine doctor at Port Townsend who received the libelant after remaining eight days with Dr. Taylor. Dr. Carter's testimony as to the proper method of procedure from start to finish corroborates the testimony of Dr. Taylor. There is no difference of opinion between the doctors, but in Dr. Carter's testimony the statements of libelant are not corroborated. Dr. Taylor says that he banded libelant's arm when he started for Port Townsend, to protect it from the cold weather and to keep it from moving or jarring, that might make it worse. This is perfectly natural, and is what any doctor would do. The libelant at this time was able to walk unassisted on the boat at Port Angeles, and in two hours from that time he was at the Marine Hospital at Port Townsend. Dr. Carter and his superiors pursued the same method after the libelant reached the Marine Hospital at Port Townsend that Dr. Taylor had been pursuing, namely, treating the infection so that the

wound would heal before they operated and wired the bones or put on Lane Plates. It is admitted by all the doctors that this was essential and necessary. If they undertook to perform this operation while the wound was open and infected, it might result in bone infection.

Libellant in his brief refers to the fact that he was placed in the charge of Dr. Taylor on Saturday and nothing was done until the following Tuesday or Wednesday. There is no testimony to show that anything should have been done with the arm during that period, but on the contrary there was nothing further to do so far as the arm itself was concerned during that period. It would be ridiculous to say that the doctors should have changed the bandages and splints within the time specified. This is not the method of practice. When the wound was thoroughly cleansed and the bones put in proper apposition and the arm bandaged and extension splints placed on them, as was done in this case, the practice is to leave it alone, unless infection or other complications set in. Of course when infection set in on Tuesday or Wednesday, it became necessary, as the doctors testified, to take down the bandages and the splints to treat the infection. All of the doctors testified that the infection then

became the primary object of treatment. Nothing more could be done with the bones until the infection was cured and the wound healed. Both Doctors Taylor and the trained nurse in charge told in detail what treatment they gave, and if this treatment was not in accordance with the methods and practice of the profession, it would have been easy enough for libelant and his counsel to show by expert testimony that it was improper and not the kind of treatment recognized by the profession.

Libelant, in closing his brief, quotes a letter written by Dr. Taylor to the surgeon in charge of the marine hospital at Port Townsend. This letter is fully set out on page 146 of the Record and is fully explained by Dr. Taylor on pages 147, 148, 149 and 150 of the record. Dr. Taylor explains that he had treated numerous sailors from United States boats and merchant boats, and that he had been trying to get a contract with the government to treat sailors at his hospital at Port Angeles. He had an arrangement with the government to pay *for* emergency work from the government boats, and he wanted to get an arrangement with the government to treat sailors from merchant boats, and he had already taken this matter up with the government officials. On page 148 Dr. Taylor says:

“A. Yes, I had been trying and had tried after this time and tried to such an extent that the Government issued papers asking for contracts and for us to give bids, and they awarded a contract the first of July of this year.”

The government has similar contracts with many private doctors and hospitals in the smaller ports up and down the coast. This letter states: “As we occasionally have patients from the different boats, we would like to know if any arrangements could be made whereby we could treat them or administer first aid. If you would send us the information regarding this matter we would be grateful.” This refers to this class of cases. The forepart of this letter has nothing to do with the libellant or his treatment. On page 149 the doctor testified as follows:

“Q. Now where you say: ‘As we have no arrangements for this class,’ did you mean to intimate by that that you had no arrangements for taking care of Mr. Fondahn?”

A. What I meant by that was, arrangement for merchant vessels with the government, I had arrangements with the captain.”

We do not understand why counsel quotes this letter, unless he hopes that it may leave an inference with the Court that no arrangements were made with the doctor to care for the libellant. In view

of the doctor's positive testimony that the captain's arrangement was sufficient and satisfactory to him, and in view of his clear explanation of the letter, libelant's counsel's purpose in quoting the letter must fail.

If we understand libelant's brief, his complaint is, first, that he should have been taken to Port Townsend instead of Port Angeles. It is admitted that Port Angeles was the nearest port. He does not show that he would have received any different or better treatment at Port Townsend than at Port Angeles. If the doctors and the nurse can be believed, he received the best treatment and the same kind of treatment that he would have received at Port Townsend. Second, he claims that the captain made no definite arrangements to pay the doctor at Port Townsend. But the Doctor himself says that he understood that he was to treat the libelant and the ship would pay him. He proceeded to treat him upon this theory, and the arrangement one way or another did not in any way affect the treatment that the libelant received. The libelant fails to show that the payment of any amount of money or the promise of any sum whatever made any difference in the care and treatment he received, and fails to show that he was damaged

in any way thereby. Third, he complains that the captain gave the doctor at Port Angeles a permit to admit him to the hospital. This is just what the captain should have done. He could not have entered the hospital without this permit. The giving of the permit did not affect this treatment in any way and cannot in any way have damaged him.

There is no testimony in the record and counsel for libelant makes no statement or argument in his brief in support of the contention that the libelant has been damaged by reason of any act of neglect on the part of this ship. He is content to quote some of the testimony of the libelant and a few statements of other witnesses, but omits to point out to the Court wherein the libelant has been damaged in any way by reason of the neglect of the master of this ship.

Since the accident the libelant has had the services of two doctors and a nurse at Port Angeles for a period of eight days, who gave the best treatment known to the profession, and since that time he has been under the care of a whole corps of doctors at Port Townsend in the Marine Hospital. On account of the seriousness of the injury, they were unable in the first instance to bring about perfect results. According to Dr. Carter and the

other physicians, it will take another operation to secure proper and perfect union of the bones. But this condition is not due to neglect or failure of anyone, but in spite of competent and efficient medical and surgical treatment.

We have not attempted to quote extensively from the testimony, for we feel that the Court will read over this testimony before rendering a decision. We ask the Court particularly to examine the testimony of the doctors who treated the libelant. Such an examination will show that the libelant was given competent treatment and was accorded every attention. The testimony will show conclusively that the captain exercised reasonable care in taking the libelant to the nearest port and in the selection of proper medical, surgical, and hospital treatment. The captain could have done no more. He could not have taken the libelant to any port where he could have received better treatment. No arrangement and no promise for the payment of money would have afforded the libelant better or more efficient treatment. The captain acted promptly and carefully and was fortunate indeed to get the libelant to the nearest port as soon as he did, and was fortunate in securing the services of good physicians and surgeons and hospital attendants. There was

nothing more—there was nothing better, that any man could have done.

We submit that under the evidence and the law, the judgment of the District Court is right and should be sustained.

R. A. BALLINGER,
ALFRED BATTLE,
R. A. HULBERT,
BRUCE C. SHORTS,
Proctors for Respondent.

4

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GUST FONDAHN,

Appellant,

vs.

SCHOONER "C. S. HOLMES," ETC.,

Appellee.

No. 2698.

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division

Petition for Rehearing

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ALFRED BATTLE,

ROBT. A. HULBERT, and

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Comes now the above named appellee and petitions the court for a rehearing herein upon the following grounds:

First:

That there is no evidence in the record to support the judgment in favor of the appellant for Five Hundred Dollars, the sum awarded by this court, or any other sum whatsoever.

It is elementary and needs no citation of authority, that one cannot recover for the neglect or wrong of another unless it is shown by a fair preponderance of the evidence that he has suffered some damage as the result of such neglect or wrong. So, even if it should be conceded that the captain did wrong in putting the libellant off at Port Angeles instead of taking him on to Port Townsend, yet there is absolutely no evidence that the libellant suffered any damage thereby. He was put under the care of Dr. Taylor, who was an experienced physician and surgeon and was equipped with a hospital and surgical facilities equal to any in the State of Washington. This evidence stands undisputed. The testimony is undisputed as to the care the libellant received at the hospital. Commencing on page 124, Dr. Taylor testifies as follows:

“Q. Now, what was done with him at the hospital?

A. He was taken to the surgery and given an anesthetic. There was a splint and dressings, if I remember right, and that was taken off and revealed a wound of the forearm, a circular wound, about one and a half or two inches in diameter, through which both bones were protruding, and it showed a very ragged wound, the muscles were torn and the periosteum torn back from the bones, a very ugly looking wound. The arm was washed with antiseptic soap and solutions, and the pieces

of cloth and one thing or other that had worked into the wound were picked out and the wound bathed with iodine; the bones put back in position and dressings applied, splints applied and put back to bed.

Q. Now, what was the nature of the splints applied?

A. The usual splints, both kinds, anterior—what we call an angular splint, it comes down this way, from the upper part of the arm and comes down here, and is tied up here and gives a pull, an extension to the arm.

Q. Do you know whether there was any particular name for that method?

A. It is just called anterior right-angular splints.

Q. In use by the profession?

A. In use by the profession for that kind of injury.

Q. You put the bones in proper position, did you?

A. Yes, the wound was open and they were put back in proper place, you could see them.

Q. And then, what, if anything, was done? Was there anything done with the muscles?

A. The muscles were torn and were all sewed up and the membranes.

Q. Did they make a covering over the bone?

A. Yes, sir."

There is not a word of testimony in the record anywhere that this was not proper treatment and

all that anybody could have done for the libellant. All the doctors testify that the libellant received the best treatment known to the profession. There is not a word of testimony in the record that the libellant would have received any different treatment had he been under the care of the physicians at Port Townsend. Then how and in what manner was the libellant damaged? It is true that the wound became infected, but all the doctors say, including the marine doctor at Port Townsend, that infection under the circumstances came almost as a matter of course on account of the nature of the wound and the condition of the libellant's body and clothing. There is not a word of testimony in the record, and we apprehend none could be produced, showing or tending to show that anything could have been done by any doctor on earth to have prevented the infection that followed in this case.

On page 5 of this court's opinion, the court said:

“The testimony indicates that if the appellant had been taken to Port Townsend the treatment of his arm would have been different from and more appropriate than that which was given him at Port Angeles, and that there was failure at the latter place to treat the injury with the care and skill which its very serious nature demanded.”

Dr. Taylor and his brother, both skilled and licensed physicians and surgeons, and the trained graduate nurse at the Taylor Hospital at Port Angeles, all testify just what was done and how the appellant was treated. There is absolutely no testimony that indicates that this treatment was not proper and the best known to the profession, and no effort was made by the libellant to offer any evidence to the contrary. The testimony of Dr. Carter, a witness on behalf of libellant, shows that he would have treated the patient in the same way, using the same character of splints.

It is hard for us to understand how it can be found that the Captain of the vessel did wrong in putting the libellant into the care of such competent doctors and well-equipped hospital at Port Angeles, but even if this was wrong, we submit that for this reason alone judgment should not be rendered for an arbitrary sum against the appellee. There should be some evidence that the appellant suffered some damage by reason of the alleged wrong. There being no such evidence, we submit that the judgment is wrong and a re-hearing should be granted.

Second:

We also ask for a rehearing upon the ground that the court has evidently misunderstood the facts.

On page two of the opinion the court says: "While in charge of Dr. Taylor the appellant's arm began to fester, and it later developed that the bones had not been in apposition and that they did not unite." The appellant's arm did "begin to fester," but there is no testimony in the record that the "bones had not been in apposition." The testimony of both doctors at Port Angeles and of the trained nurse state positively that the bones were set and put in perfect apposition. Dr. Taylor's testimony hereinbefore quoted shows that the wound was open and he saw the bones in perfect apposition, and that an X-ray was afterwards taken. It is true that the bones did not unite, but all of the doctors, including Dr. Carter, the Marine Doctor at Port Townsend, stated that the reason for this failure of union was due to the damage to the periosteum caused at the time of the accident and to the infection which followed later. No doctor had any control over this situation, and it would have been the same had the libellant been at Port Townsend at the Marine Hospital. So it cannot be successfully contended that the alleged wrong of the Captain in putting the libellant off at Port Angeles or his neglect in taking him on to Port Townsend had anything to do with the infection, or the failure of the bones to properly unite.

Under all the circumstances and the admitted facts in the record, the Captain was not at fault in stopping at Port Angeles, but he might have been negligent if he had carried the libellant on to Port Townsend. The libellant was in a critical condition and needed medical and surgical attention at the earliest possible moment. The wound was dirty and filled with bits of the sailor's woolen shirt. A few hours more of inattention might have resulted in gangrene. The Captain realized this. Upon investigation, the Captain found that there were competent surgeons in Port Angeles equipped with an up-to-date hospital and surgical facilities. Certainly in morals and in law, he was bound under the facts and circumstances of this case to stop at Port Angeles and put the libellant in a way to receive this care and attention. If he had carried him on to Port Townsend and gangrene had set in and the man had lost his arm or suffered severely from blood-poison, the Captain would have laid himself open to just criticism and censure for not having placed him in the hands of the doctors at Port Angeles.

We submit that in any event there is no testimony in the case to support the contention that the libellant suffered any damage by reason of any

neglect or wrong of the Captain of this vessel, and for that reason alone a rehearing herein should be granted.

Respectfully submitted,

R. A. BALLINGER,

ALFRED BATTLE,

ROBT. A. HULBERT, and

BRUCE C. SHORTS,

Proctors for Appellee.

United States
Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW
YORK, a Corporation,

Appellant,

VS.

CLARA MILLS, GEORGE F. STEELE, Insurance
Commissioner of the State of Idaho, et al.,

Appellees.

Transcript of Record

*Upon Appeal from the United States District Court
for the District of Idaho, Southern Division.*

United States
Circuit Court of Appeals
For the Ninth Circuit.

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YORK, a Corporation,

Appellant,

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Insurance Commissioner.

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Boise, Idaho;
J. G. Hedrick,
Hailey, Idaho,
Attorneys for Appellees, William Leonard,
L. A. Dithmer et al.

IN EQUITY—NO. 529.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

AMERICAN SURETY COMPANY OF NEW
YORK, a corporation,

Plaintiff,

vs.

CLARA MILLS, W. P. EASTWOOD, A. J. SULLIVAN, CETH D. PEACOCK, JOHN C. BAUGH, T. J. REED, JOSEPH W. FULD, ANDREW McMONIGLE, MRS. P. DONOHUE, MRS. M. M. TIPTON, FRANK McDANIELS, RUSSEL B. WESTMAN, FRED H. POVEY, LOUIE JOE, CHING BING, HARRIS FURNITURE CO., MRS. C. E. HARRIS, JIM RIGGI, E. R. RICHARDS, HAILEY HOSE CO., CHARLES CUNEO, FRANK MORRIS, HAILEY BUTCHER CO., L. J. McCONNELL, JULIA HAUPT, JOHN MIZER, JOHN SEYMOUR, MRS. T. POVEY, W. J. OLIVER, PELKY & CO., JOHN PUGEL, ENRIQUE E. JOYWECHEO, MARGARET SUTHERLAND, ELLEN WALKER, H. WHITMORE, AUGUSTUS ANACABEE, VINCENTE GUIASOLA, MAGGIE J. PORTER, F. R. GOODING, assignee of Richard Jones and E. H. Baker, CHARLES CUNEO, assignee of Fidela Rsteinsia, Leo Bott, Thomas Johnson, Louis D. Paoli and Giulio Pallinio, PETER SNIDER, assignee of G. Guigliani, Mark

Faladora, C. Juliean and Joe Fereta, F. W. NITSCHKE, Treasurer of F. O. E. Lodge, SULLIVAN & SULLIVAN, assignee of I. N. Sullivan, J. J. McFADDEN, administrator, with will annexed, of the estate of Frank E. Foote, deceased, McFADDEN & BRODHEAD, Trustees, M. E. MALLORY, Treasurer of Hailey Baseball Club, E. DAFT, Receiver of Idaho State Bank, assignee of J. S. Whitton, WILLIAM LEONARD, L. A. DITHMER, J. M. McPHERSON, ROBERT FRANKLIN, J. F. McCOY, E. W. KLEINMAN, FRIEDMAN COMPANY, Ltd., a corporation, LUCILE FRIEDMAN, S. J. BENSON, AUKE-MA DRUG COMPANY, M. J. DALY, BELLEVUE STATE BANK, a corporation, assignee of Jos. Werry, HARRY J. ALLEN, MRS. W. J. LAMME, W. J. LAMME, ANNIE I. HARRIS (formerly Annie I. Miller), and GEORGE F. STEELE, Insurance Commissioner of the State of Idaho,

Defendants.

BILL OF COMPLAINT.

*To the Honorable, the Judges of the District Court
of the United States, for the District of Idaho,
Southern Division:*

The American Surety Company of New York, a corporation organized and existing under and by virtue of the laws of the State of New York, and a citizen and resident of said State of New York, with its principal place of business in the City of New

York, said State, brings this its bill of complaint against Clara Mills, W. P. Eastwood, A. J. Sullivan, Ceth D. Peacock, John C. Baugh, T. J. Reed, Joseph W. Fuld, Andrew McMonigle, Mrs. P. Donohue, Mrs. M. M. Tipton, Frank McDaniels, Russel B. Westman, Fred H. Povey, Louie Joe, Ching Bing, Harris Furniture Co., Mrs. C. E. Harris, Jim Riggi, E. R. Richards, Hailey Hose Co., Charles Cuneo, Frank Morris, Hailey Butcher Co., L. J. McConnell, Julia Haupt, John Mizer, John Seymour, Mrs. T. Povey, W. J. Oliver, Pelky & Co., John Pugel, Enrique E. Joywecheo, Margaret Sutherland, Ellen Walker, H. Whitmore, Augustus Anacabee, Vicente Guisasola, Maggie J. Porter, F. R. Gooding, assignee of Richard Jones and E. H. Baker, Charles Cuneo, assignee of Fidela Rsteinsia, Leo Bott, Thomas Johnson, Louis D. Paoli and Gialio Pallinio, Peter Snider, assignee of G. Guigliani, Mark Faladora, C. Juliean, and Joe Fereta, F. W. Nitschke, Treasurer of F. O. E. Lodge, Sullivan & Sullivan, assignee of I. N. Sullivan, J. J. McFadden, administrator, with will annexed, of the estate of Frank E. Foote, deceased, McFadden & Brodhead, Trustees, M. E. Mallory, Treasurer of Hailey Baseball Club, E. Daft, Receiver of Idaho State Bank and assignee of J. S. Whitton, William Leonard, L. A. Dithmer, J. M. McPherson, Robert Franklin, J. F. McCoy, E. W. Kleinman, Friedman Company, Ltd., a corporation, Lucile Friedman, S. J. Benson, Aukema Drug Company, M. J. Daly, Bellevue State Bank, a corporation, assignee of Jos. Werry, Harry J. Allen, Mrs.

W. J. Lamme, W. J. Lamme, Annie I. Harris (formerly Annie I. Miller), and George F. Steele, Insurance Commissioner of the State of Idaho; and there-upon your orator complains and alleges:

I.

That the said complainant, American Surety Company of New York, during all the times herein-after mentioned was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and is a citizen of said State, with its principal place of business in the City of New York, State of New York.

II.

That the above-named defendants are, and each of them is and was at the time of the commencement of this action, excepting the defendant Annie I. Harris (formerly Annie I. Miller) who is and was at the time of the commencement of this action a resident and citizen of the State of California, residents and citizens of the State of Idaho, residing in Blaine County, State of Idaho, excepting the said Annie I. Harris (formerly Annie I. Miller) who is and was during the times herein mentioned a resident of Los Angeles, State of California, and excepting the defendant George F. Steele, who is and was at the time of the commencement of this action a resident of the County of Ada, State of Idaho.

III.

That the complainant American Surety Company of New York is doing business in the State of Idaho

under and by virtue of a compliance with the laws of the State of Idaho; and at all the times herein mentioned has been and now is qualified and authorized to transact a general surety business in the State of Idaho.

IV.

That the said defendant George F. Steele is now the duly qualified and acting Insurance Commissioner of the State of Idaho.

V.

That this suit is of a civil nature in equity, and is wholly between citizens of different states, and that the amount in controversy herein exceeds the sum of Three Thousand Dollars (\$3,000.00) exclusive of interest and costs.

VI.

That one William G. Cruse was duly appointed by the Governor of the State of Idaho, by and with the advice and consent of the Senate of said State, Bank Commissioner in and for the State of Idaho on or about the 6th day of March, 1909, for a period of four years from and after the said 6th day of March, 1909.

VII.

That under the provisions of the statutes of Idaho in such cases made and provided, and on or about the 15th day of March, 1909, the said William G. Cruse, as principal, and this complainant American Surety Company of New York, as surety, executed to the State of Idaho that certain bond or obligation

in writing, a copy of which bond is hereto attached, marked Exhibit "A," and by reference made a part hereof.

VIII.

That on or about the 31st day of August, 1910, the Idaho State Bank, a corporation organized and existing under the laws of the State of Idaho and doing a general banking business at Hailey, Blaine County, Idaho, at which time all of the said defendants, save and except the said George F. Steele, were creditors and depositors of such bank, closed its doors and suspended payment, and at that time was and ever since has been unable to meet the demands of its said creditors or depositors in the usual and ordinary course of business, or at all.

IX.

That on or about the 31st day of August, 1912, the State of Idaho, for the use and benefit of those certain defendants above-named, in the respective amounts set opposite such respective names, to-wit:

Clara Mills	\$ 776.94
W. P. Eastwood	1,302.66
A. J. Sullivan	310.27
Ceth D. Peacock	595.26
John C. Baugh	166.24
T. J. Reed	1,518.75
Joseph W. Fuld	301.52
Andrew McMonigle	238.09
Mrs. P. Donohue	249.13
Mrs. M. M. Tipton	72.61

Frank McDaniels	475.09
Russel B. Westman	471.75
Fred H. Povey	238.09
Louie Joe	1,078.60
Ching Bing	1,190.52
Harris Furniture Co.	621.51
Mrs. C. E. Harris	694.38
Jim Riggi	106.55
E. R. Richards	124.73
Hailey Hose Co.	29.75
Charles Cuneo	504.73
Frank Morris	178.58
Hailey Butcher Co.	60.77
L. J. McConnell	119.02
Julius Haupt	1,250.08
John Mizer	300.48
John Seymour	250.96
Mrs. T. Povey	119.02
W. J. Oliver	294.06
Pelky & Co.	615.43
John Pugel	357.16
Enrique E. Joywecheo	476.20
Margaret Sutherland	238.09
Ellen Walker	238.09
H. Whitmore	1,226.20
Augustus Anacabee	357.16
Vincente Guisasola	547.64
Maggie J. Porter	193.44
F. R. Gooding, Assignee—	
Richard Jones	190.48
E. H. Baker	147.60

Charles Cuneo, Assignee—

Fidela Rsteinsia	119.02
Leo Bott	86.30
Thomas Johnson	59.50
Louis D. Paoli	39.26
Giulio Pallinio	136.90

Peter Snider, Assignee—

G. Guigliani	106.55
Mark Faladora	178.58
C. Juliean	86.30
Joe Fereta	43.44

F. W. Nitschke, Treasurer F. O. E. Lodge 351.58

Sullivan & Sullivan, Assignee I. N. Sullivan
van 197.62

J. J. McFadden, Administrator, with will
annexed, of the estate of Frank E. Foote,
deceased 1,374.24

McFadden & Brodhead, Trustees 372.60

M. E. Mallory, Treasurer of Hailey Baseball
Club 649.55

E. Daft, Receiver, Assignee J. S. Whitton. 595.26

commenced an action in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Blaine, by filing a complaint against the complainants herein, American Surety Company of New York, to recover from said American Surety Company under the penalty specified in said bond (Exhibit "A") the respective amounts above set forth. And this complainant American Surety Company on the 7th day of October, 1912, and before the time in which this complainant was

required by the laws of the State of Idaho or the rules of such State Court in which said suit was brought to answer or plead to the complaint of plaintiffs filed therein had expired, duly served a written notice of petition and bond for removal of said cause to this Court, including copy of said petition and bond for removal, upon counsel of record for plaintiffs in said action; and on the 8th day of October, 1912, and before the time in which this complainant was required by the laws of said State or the rules of said Court to answer or plead to the complaint of plaintiffs filed therein had expired, duly filed the said petition and bond for removal and such written notice with the Clerk of said Court, in full compliance with the provisions of Section 29 of the Judicial Code of the United States, and on the 28th day of October, 1912, complainant filed with the Clerk of this Court a certified copy of the record in such suit in full compliance with the provisions of said Section 29 of the Judicial Code; that pending the determination of such right of removal, and on the 16th day of October, 1912, the default of this complainant was entered by the Clerk without notice to or knowledge thereof by this complainant; and such default was entered in said cause notwithstanding the fact that this complainant had filed such petition and bond for removal and had served and filed such written notice required by said Section 29 of the Judicial Code, and while complainant was in good faith removing said cause to this Court and before the jurisdiction of this Court had been determined, and by

reason thereof this complainant was prohibited from defending against the said action; that on May 19, 1913, judgment was entered against this complainant on such default for the sum of \$22,624.33 and in favor of the plaintiffs in said action for the respective amounts above stated, and without fault or negligence on the part of this complainant, although this complainant believed, and was so advised by its counsel and so alleges the fact to be, that it had a good and meritorious defense to the said action, which, by reason of such default, it was denied the right to plead or set up in said cause.

X.

That on or about the 30th day of August, 1913, the State of Idaho, for the use and benefit of those certain defendants above named, in the respective amounts set opposite said respective names, to-wit:

L. A. Dithmer	\$ 391.96
J. M. McPherson	125.74
Robert Franklin	164.00
J. F. McCoy	702.00
E. W. Kleinman	240.15
Friedman Company, Ltd.	131.82
Lucile Friedman	97.79
S. J. Benson	568.28
Aukema Drug Company	264.09
M. J. Daly	388.14
Bellevue State Bank, Assignee Jos. Werry	410.00
Harry J. Allen	36.90
Mrs. W. J. Lamme	463.30

W. J. Lamme 97.79

Annie I. Harris (formerly Annie I. Miller) 38,271.65

and for a total sum of about \$56,000.00, including interest from the first day of September, 1910, at the rate of seven per cent. (7%) per annum, commenced an action in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Blaine, against this complainant, American Surety Company of New York, to recover from this complainant under the penalty specified in said bond (Exhibit "A") the respective amounts above set forth, which action is still pending and undetermined in the said Court.

XI.

That there is now pending in this court and undetermined that certain action at law, wherein the State of Idaho, to and for the use and benefit of William Leonard, is plaintiff, and this complainant American Surety Company of New York, is defendant, which action was brought to recover from this complainant the sum of \$9,656.93 under the penalty contained in the said bond, Exhibit "A."

XII.

That the said judgment so recovered in the said State Court for the said sum of \$22,624.33, together with interest thereon, and the amount claimed in the said action now pending and undetermined in the said State Court for the said sum of about \$56,000.00, with interest thereon, and the amount

claimed in the said action now pending and undetermined in this court for the sum of \$9,656.93, with interest thereon, aggregate upwards of \$90,000.00, or an amount exceeding by more than \$40,000.00 the total penalty of the said bond, Exhibit "A".

XIII.

That the said William Leonard and the defendants named in paragraph X hereof, plaintiffs in the action pending in said State Court, for Blaine County, Idaho, contend that their said claims are valid claims against this complainant under said bond (Exhibit "A"), and that they are entitled to judgment against complainant for the full amount of their said claims, with interest thereon, making in the aggregate the sum of approximately \$69,000.00; that the claims so made against this complainant in the said actions are based largely upon questions and legal propositions which have not heretofore been adjudicated or determined by the courts, and it is impossible for this complainant, because of the nature of the claims which are being made against it, to determine the extent of its liability under said bond (Exhibit "A") and the aggregate amount of the valid claims against it under said bond until the said actions so pending as aforesaid have been finally determined; but complainant fears, and has reason to fear, that judgment or judgments will be rendered against it on said bond, and that the amount of such judgments may be in excess of the penal sum of such bond, and that complainant, unless protected by this Honorable

Court as hereinbefore prayed, may be compelled to pay far in excess of the penal sum of said obligation (Exhibit "A").

XIV.

That the judgment so obtained against this complainant for the sum of \$22,624.33, for the use and benefit of the persons named in paragraph IX hereof, was wrongfully obtained through accident and mistake without fault or negligence of complainant, and particularly in this, that while complainant was in good faith and in full compliance with the provisions of Section 29 of the Judicial Code removing said action from said State Court to the Federal Court for said District, the attorneys for said defendants prevailed upon the Clerk of said State Court, without the knowledge of the said Court or of this complainant, to enter complainant's default so that complainant would be deprived of the right of trial on the merits in said State Court; and this suit involves the construction of said Section 29 of the Judicial Code and other sections of said Code and the right of said Clerk to enter such default while the proceedings for removal were so pending, and said judgment so obtained is unjust, inequitable, unconscionable and invalid because of the manner in which it was obtained, and the use which the defendants named in said paragraph IX intend to make and will make of said judgment in order to obtain the payment of the full amount thereof before the claims of the said Leonard

and the other defendants, named in paragraph X hereof, and before the amount of the dividends received by said defendants, as hereinafter set forth, have been ascertained and determined, is likewise unjust, inequitable, unconscionable and wrong, not only as against this complainant but as against the other defendants herein named, who have actions pending against this complainant, as aforesaid, under said bond.

XV.

That the said defendants, named in paragraph IX hereof, have collected since commencing their said action against this complainant, as well as since recovering the said judgment, dividends from the Receiver of said Idaho State Bank at Hailey, Idaho, on the claims which they made against this complainant and on which judgment was recovered, as aforesaid, and have received from said receiver on account of said claims large sums of money, the full amount thereof being unknown to this complainant; but complainant is informed and believes and alleges the fact to be, that the sums so received by said defendants, named in paragraph IX hereof, aggregate several thousand dollars, and that none of said dividends or payments so received have been credited on said judgment, notwithstanding said judgment was obtained for the full amount which the said defendants had on deposit with said Bank at the time it closed its doors and suspended payment, as aforesaid.

XVI.

That the said William Leonard and the defendants named in paragraph X hereof, who have actions now pending against this complainant as aforesaid for more than the full amount of the penalty named in said bond (Exhibit "A"), contend that the judgment hereinbefore mentioned and recovered against this complainant, to and for the use and benefit of the defendants named in paragraph IX hereof, is unconscionable, inequitable and void as against the said William Leonard and the defendants named in paragraph X hereof, for the reason that the same was recovered and obtained in the manner hereinbefore stated, and for the reason that the same was not obtained after a trial on the merits, and for the further reason that the said William Leonard and the other defendants named in paragraph X hereof, whose suits are now pending as aforesaid, were necessary and indispensable parties thereto, as they had claims against complainant under the same bond for more than the full amount of the penal sum therein named, and they will therefore sustain a loss to the extent that any sum whatsoever is recovered under said obligation or bond by the defendants named in paragraph IX hereof; and the said William Leonard and the other defendants named in paragraph X hereof deny the right of this complainant to pay any sum whatsoever in satisfaction of said judgment, obtained as aforesaid, and threaten to and will, as this complainant verily believes, hold this complainant liable in damages for any and all pay-

ments made under said judgment or in satisfaction thereof, to the extent that such payment or payments reduces the amount that may be recovered under said bond (Exhibit "A") by said William Leonard and the defendants named in paragraph X hereof.

XVII.

That complainant is informed and believes, and so alleges the fact to be, that the said William Leonard and the defendants named in paragraph X hereof have likewise since the commencement of said actions received dividends from the Receiver of said Idaho State Bank at Hailey, Idaho, on account of the claims on which their said actions are based, to an amount aggregating several thousand dollars, the total sum so received by said defendants being unknown to this complainant; that because of the nature of the claims so made against this complainant by the said defendants, and each of them, as aforesaid, and because of the dividends so received by said defendants and for which no credit has been given this complainant, it is impossible for this complainant to determine what sum or amount, if any, is due said defendants, or any of them; but complainant alleges the fact to be that under the law and the principles of equity, good conscience, and fair dealing all persons, parties and individuals who may have or establish rights under said bond (Exhibit "A") should only have, recover or receive their pro rata part of the amount of their respective claims, if the total amount of the valid claims made against complain-

ant exceeds the penal sum named in said bond, and that all rights under said bond relate back to the execution thereof, and that all of said claims arise out of the same transaction and as of the same time, and no claim or claimant has preference or priority over another. But this complainant, for the reasons hereinbefore stated, cannot safely pay any of said claims until the liability of complainant in all of said actions, pending and under the judgment heretofore recovered has been finally determined and the total amount due under said bond ascertained, and until the pro rata part payable to each of said claimants has been ascertained, in the event the aggregate of all valid claims exceeds the penalty of said bond (Exhibit "A").

XVIII.

That complainant is advised by its counsel, and so alleges the fact to be, that the action brought to and for the use of the defendants named in paragraph IX hereof, and which complainant sought to remove from said State Court to the Federal Court, was in fact a removable cause, and a cause which this complainant was entitled to remove to this Court under Section 29, and other sections, of the Judicial Code of the United States, and that it had a good and meritorious defense to said action, which it was prevented from setting up in said cause because of the wrongful and unconscionable entry of such default and the refusal of the said State Court to set aside said default when application was made therefor by com-

plainant. That the defendants, named in paragraph IX hereof, through their counsel, opposed the setting aside of said default, notwithstanding complainant requested the Court in which said action was pending to set aside such default on such terms as would be just and fair to said defendants, to and for whose use and benefit said action was brought; and complainant, defendant in said action, was at all times able, ready and willing to pay into said State Court such sum as said State Court might impose as terms for setting aside such default, and such damages as had been or would be sustained by the plaintiffs in said action, or the persons for whose use and benefit the same was brought, because of the setting aside of such default, all of which offers were refused by the defendants named in paragraph IX hereof and their attorneys, and said defendants and their attorneys at all times declined to permit such default to be set aside, and declined to permit this complainant, defendant in said action, to file an answer in said cause or to have a trial therein on the merits.

XIX

That complainant is advised by its counsel and believes that it has a good and meritorious defense to many, if not all, of the claims which have been made against it by the said defendants, but for the reasons hereinbefore stated it is impossible for complainant to determine the aggregate amount of the valid claims that may be established against it, and until the same have been finally determined com-

plainant cannot know and cannot ascertain whether the aggregate of the valid claims against it will exceed the penalty named in said bond, and the amount to be paid by complainant under said bond cannot be ascertained until an accounting has been had of the sums that have been received by the said defendants as dividends from the Receiver of said Idaho State Bank on the said judgment and on the claims which are being made against this complainant, as aforesaid, and until the validity of said claims have been established either in the actions now pending, as aforesaid, or in other appropriate proceedings.

XX.

That complainant is informed and believes, and alleges the fact to be, that the defendants named in paragraph IX hereof, and for whose use and benefit the said judgment was obtained, as aforesaid, intend to apply to the defendant George F. Steele, as Insurance Commissioner of the State of Idaho, to cancel and revoke the certificate of authority of this complainant to do a surety business within the State of Idaho, unless this complainant shall pay said unconscionable, void, and inequitable judgment on or before the 17th day of May, 1915, the same being ninety days after the filing of the remittitur from the Supreme Court in the action in which said judgment was obtained, and as provided in Sections 90, 92 and 93 of an Act of the Legislature of the State of Idaho relating to an Insurance Department in said State, approved March 14, 1911, Session Laws of the

State of Idaho for 1911, pages 732 to 781; and complainant verily believes that the said defendant, George F. Steele, as Insurance Commissioner, will, unless restrained by this Honorable Court, on or about the 17th day of May, 1915, revoke and cancel the certificate of authority of this complainant to do business in the State of Idaho, and revoke the right of this complainant to do business in said State unless complainant pays said judgment in full; that the cancellation of the certificate of authority of this complainant to do business in the State of Idaho, and the revocation of its right to do business in said State will do great and irreparable injury to this complainant, and will damage this complainant in a sum far in excess of Three Thousand Dollars (\$3,000.00); that this complainant has an unimpaired capital and surplus of over Six Million Dollars, and is financially responsible, and is able, ready, and willing to pay all valid claims that may be established against it under said bond (Exhibit "A") as soon as the full amount thereof has been determined and the share or amount due the several defendants ascertained, so that the complainant can safely pay the same without incurring additional liability to other claimants, defendants hereto, or subjecting itself to suits for damages for having paid any of said claimants more than his pro rata part of the penalty named in said bond.

XXI.

That unless the said George F. Steele, as Insurance Commissioner of the State of Idaho, be enjoined and

restrained from taking any action canceling or annulling the certificate of authority of this complainant to do business in the State of Idaho, or revoking or in any manner impairing its right to do business in said State as a surety company, and unless the defendants named in paragraph IX hereof be enjoined and restrained from taking any action or instituting any proceeding for the collection of said judgment or enforcing the payment thereof, and the other defendants herein named be likewise enjoined and restrained from enforcing any judgment which they may obtain until all claims so made against this complainant by the said defendants have been adjudicated and determined and an accounting had of the dividends received by said defendants, and the amount to be paid to the said defendants definitely ascertained and determined, this complainant will be compelled, in order to preserve and protect its right to do business in the State of Idaho, to pay said void and unconscionable judgment in full, and the said defendants named in paragraph IX hereof will receive a sum largely in excess of what they are entitled to or could receive if an accounting were had, and complainant will be subjected to claims and suits on the part of the other defendants for having paid to the defendants named in paragraph IX hereof moneys which the other defendants herein claim they are entitled to receive; and complainant will by such action of the said defendants suffer great and irreparable injury, and may be compelled to pay a sum in excess of the penalty of said bond and in excess of the

amount justly due the said defendants; and complainant will further be involved in a multiplicity of suits and actions, and will be deprived of its property and rights without due process of law in contravention of the provisions of the Fifth Amendment to the Constitution of the United States and Section 1 of the Fourteenth Amendment to said Constitution.

XXII.

That by reason of the premises, this complainant has no plain, speedy or adequate remedy at law, but can only have relief in a court of equity.

XXIII.

That while the State of Idaho is named as plaintiff in each of the actions hereinbefore described, to and for the use and benefit of the several defendants herein named, it is nevertheless expressly alleged in the complaint in each of said actions that the State of Idaho has no interest whatsoever in the claims on which said actions are based, or in any judgment recovered or that may be recovered in such actions; and complainant alleges the fact to be that the State of Idaho has no interest whatsoever in said judgment or in the said actions, but is acting in said actions and in all matters connected therewith at the instance and request and for the use and benefit of the parties designated in the complaint in each of said actions as the parties for whose use and benefit such action was brought or is being prosecuted.

In Consideration Whereof, and forasmuch as this complainant is remediless in the premises according

to the strict course of the common law, and can only have relief in a court of equity, this complainant prays the aid of this Honorable Court as follows:

(a) That the defendants Clara Mills, W. P. Eastwood, A. J. Sullivan, Ceth D. Peacock, John C. Baugh, T. J. Reed, Joseph W. Fuld, Andrew McMonigle, Mrs. P. Donohue, Mrs. M. M. Tipton, Frank McDaniels, Russel B. Westman, Fred H. Povey, Louie Joe, Ching Bing, Harris Furniture Co., Mrs. C. E. Harris, Jim Riggi, E. R. Richards, Hailey Hose Co., Charles Cuneo, Frank Morris, Hailey Butcher Co., L. J. McConnell, Julia Haupt, John Mizer, John Seymour, Mrs. T. Povey, W. J. Oliver, Pelky & Co., John Pugel, Enrique E. Joywecheo, Margaret Sutherland, Ellen Walker, H. Whitmore, Augustus Anacabee, Vincente Guisasola, Maggie J. Porter, F. R. Gooding, Assignee of Richard Jones and E. H. Baker, Charles Cuneo, Assignee of Fidela Rsteinsia, Leo Bott, Thomas Johnson, Louis D. Paoli, and Giulio Pallinio, Peter Snider, Assignee of G. Guigliani, Mark Faladora, C. Juliean and Joe Fereta, F. W. Nitschke. Treasurer of F. O. E. Lodge, Sullivan & Sullivan, Assignee of I. N. Sullivan, J. J. McFadden, Administrator, with the will annexed, of the estate of Frank E. Foote, deceased, McFadden & Brodhead, Trustees, M. E. Mallory, Treasurer of Hailey Baseball Club, and E. Daft, Receiver of Idaho State Bank and Assignee of J. S. Whitton, and their agents, attorneys, assignees and all persons acting for them, or either of them, may be restrained and enjoined,

preliminary until final hearing and perpetual thereafter, from enforcing or taking any action whatsoever for the collection of that certain judgment recovered for their use and benefit in the District Court of the Fourth Judicial District of the State of Idaho, in and for Blaine County on the 19th day of May, 1913, unless the same shall hereafter be held and decreed to be a valid and enforceable judgment, and then only for the amount which it may be adjudged and decreed this complainant should or ought to pay to the defendants above-named after deducting from said judgment and crediting complainant with all dividends received by said defendants from the Receiver of the Idaho State Bank at Hailey, Idaho.

(b) That the defendant George F. Steele, as Insurance Commissioner of the State of Idaho, and his successor and successors in office, and all persons acting for him or in his behalf, place or stead, be restrained and enjoined, preliminary until final hearing and perpetual thereafter, from canceling, revoking, annulling, or in anywise impairing the certificate, right or authority of the complainant, American Surety Company of New York, from doing business in the State of Idaho as a surety company, or otherwise, for failure of this complainant to pay the full amount of the judgment recovered as aforesaid for the use and benefit of the said Clara Mills and the other defendants named in paragraph (a) hereof, until it has been adjudged and decreed that said judgment is a valid and enforceable obligation

against this complainant, and until the amount, if any, has been ascertained and determined (after an accounting had and made as herein prayed) which this complainant should or ought to pay to the said defendants, or any of them.

(c) That the defendants William Leonard, L. A. Dithmer, J. M. McPherson, Robert Franklin, J. F. McCoy, E. W. Kleinman, Friedman Company, Ltd., Lucile Friedman, S. J. Benson, Aukema Drug Company, M. J. Daly, Bellevue State Bank, Assignee of Jos. Werry, Harry J. Allen, Mrs. W. J. Lamme, W. J. Lamme and Annie I. Harris (formerly Annie I. Miller) be restrained and enjoined, preliminary until final hearing and perpetual thereafter, from enforcing any judgment that may be obtained by them, or any or either of them, in any action prosecuted for the use and benefit of said defendants, or any or either of them, until an accounting has been had and the total liability of complainant under the said bond (Exhibit "A") has been ascertained and determined and proper credit allowed said complainant for all dividends received by said defendants from the Receiver of said Idaho State Bank of Hailey, Idaho, and the amount which should or ought to be paid by complainant to the defendants has been ascertained and determined.

(d) That an account may be taken in this behalf by and under the direction of this Court, of the whole of the indebtedness, principal and interest, due from this complainant to the said defendants, or any of

them, and of the dividends received by said defendants, and each of them, from the Receiver of said Idaho State Bank of Hailey, Idaho, and the amount ascertained and determined which this complainant should or ought to pay to the said defendants because of the obligation assumed by this complainant or liability created under or by virtue of said bond (Exhibit "A").

(e) That complainant may have such other and further relief in the premises as the nature of the case may require, and as shall be proper and agreeable to the principles of equity and to this Court, and for its costs herein.

And may it please your Honors to grant to your orator a Writ or Writs of Subpoena, and other process, directed to the Marshal of said District, commanding him that he summon the defendants hereinabove named to be and appear in this Court on a certain day therein named, and under a certain penalty therein to be limited and stated, and then and there, singly and severally, to make full, true and direct answer to this Bill of Complaint (but not under oath, such answer under oath being expressly waived as to each of said defendants), and to show cause, if any they have, why the prayer of this Bill of Complaint should not be granted according to the rules and practices of this Honorable Court, and to stand ready to perform and abide by such order, direction or decree as may be made against them in the premises and as to your Honorable Court shall seem meet.

And your orator will ever pray, etc.

AMERICAN SURETY COMPANY
OF NEW YORK,

By RICHARDS & HAGA,

Its Solicitors,

Residence: Boise, Idaho.

McKEEN F. MORROW,

Counsel for Complainant,

Residence: Boise, Idaho.

(Duly verified).

EXHIBIT "A".

AMERICAN SURETY COMPANY
OF NEW YORK
CAPITAL AND SURPLUS \$5,000,000.00
BANK COMMISSIONER'S BOND.

Know All Men by These Presents: That we, William G. Cruse of Boise, Ada County, State of Idaho, as principal, and the American Surety Company of New York, a corporation of the State of New York, and doing business in the State of Idaho, as surety, are held and firmly bound unto the State of Idaho in the sum of Fifty Thousand (\$50,000.00) Dollars, lawful money of the United States of America to be paid to the said State of Idaho, for which payment, well and truly to be made, said principal binds himself, his heirs, executors and administrators, and said surety binds itself and successors jointly and severally, firmly by these presents.

Sealed with our seals and dated this 15th day of March, A. D. 1909.

The Condition of the above obligation is such that, Whereas, the above bounden principal, William G. Cruse, was on the 6th day of March, 1909, appointed State Bank Commissioner in and for the State of Idaho for a term of four years, from March 6th, 1909, unless sooner removed.

Now Therefore, if the said William G. Cruse shall well, faithfully and impartially discharge the duties of his office and pay over to the person entitled by law to receive it, all money coming into his hands by virtue of his office, and that he will pay any and all damages and costs that may be adjudged against him under the provisions of Chapter 12, Title 2, Political Code and Chapter 13, Title 4 of the Civil Code of Idaho, and shall well and truly perform all the duties of such office required by any law to be enacted subsequently to the execution of this bond, then this obligation to be void, otherwise to remain in full force and effect.

WM. G. CRUSE.

AMERICAN SURETY COMPANY
OF NEW YORK,

By WESLEY KING,

(Seal)

Res. Vice President.

Attest: Bradley Sheppard,

Agent, Boise, Idaho.

“O. K. McDougal”

Attest: Stanley Whitehead,

Res. Asst. Secretary.

AMERICAN SURETY COMPANY
OF NEW YORK

CAPITAL AND SURPLUS \$5,000,000.00

State of Utah,

County of Salt Lake,—ss.

On the 15th day of March, 1909, personally appeared before me Wesley E. King, Resident Vice President of the American Surety Company of New York, to me known, who being by me duly sworn did depose and say: That he resided in the City of Salt Lake, State of Utah; that he is the Resident Vice President of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Trustees of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said Wesley E. King further said that he was acquainted with Stanley Whitehead and knew him to be one of the Resident Assistant Secretaries of said corporation, that the signature of said Stanley Whitehead subscribed to the said instrument is in the genuine handwriting of the said Stanley Whitehead and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him, the said Wesley E. King, Resident Vice President.

WESLEY E. KING.

Subscribed and sworn to before me this 15th day of March, 1909.

(Seal)

ROBERT F. HERRON,
Notary Public.

My commission expires Aug. 20th, 1912.

(Attached thereto is an extract from the record book of the Board of Trustees of the American Surety Company of New York).

Endorsed: Filed May 6th, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

IN EQUITY—NO. 530.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

WILLIAM LEONARD,

Plaintiff,

vs.

CLARA MILLS, W. P. EASTWOOD, A. J. SULLIVAN, CETH D. PEACOCK, JOHN C. BAUGH, T. J. REED, JOSEPH W. FULD, ANDREW McMONIGLE, MRS. P. DONOHUE, MRS. M. M. TIPTON, FRANK McDANIELS, RUSSEL B. WESTMAN, FRED H. POVEY, LOUIE JOE, CHING BING, HARRIS FURNITURE CO., MRS. C. E. HARRIS, JIM RIGGI, E. R. RICHARDS, HAILEY HOSE CO., CHARLES CUNEO, FRANK MORRIS, HAILEY BUTCHER CO., L. J. McCONNELL, JULIA HAUPT, JOHN MIZER, JOHN SEYMOUR, MRS. T.

POVEY, W. J. OLIVER, PELKY & CO., JOHN PUGEL, ENRIQUE E. JOYWECHEO, MARGARET SUTHERLAND, ELLEN WALKER, H. WHITMORE, AUGUSTUS ANACABEE, VINCENTE GUIASOLA, MAGGIE J. PORTER, F. R. GOODING, assignee of Richard Jones and E. H. Baker, CHARLES CUNEO, assignee of Fidela Rsteinsia, Leo Bott, Thomas Johnson, Louis D. Paoli and Giulio Pallinio, PETER SNIDER, assignee of G. Guigliani, Mark Faladora, C. Juliean and Joe Fereta, F. W. NITSCHKE, Treasurer of F. O. E. Lodge, SULLIVAN & SULLIVAN, assignee of I. N. Sullivan, J. J. McFADDEN, administrator, with will annexed, of the estate of Frank E. Foote, deceased, McFADDEN & BRODHEAD, Trustees, M. E. MALLORY, Treasurer of Hailey Baseball Club, E. DAFT, Receiver of Idaho State Bank, assignee of J. S. Whitton, L. A. DITHMER, J. M. McPHERSON, ROBERT FRANKLIN, J. F. McCOY, E. W. KLEINMAN, FRIEDMAN COMPANY, Ltd., a corporation, LUCILE FRIEDMAN, S. J. BENSON, AUKEMA DRUG COMPANY, M. J. DALY, BELLEVUE STATE BANK, a corporation, assignee of Jos. Werry, HARRY J. ALLEN, MRS. W. J. LAMME, W. J. LAMME, ANNIE I. HARRIS (formerly Annie I. Miller), and AMERICAN SURETY COMPANY OF NEW YORK, a corporation,

Defendants.

BILL OF COMPLAINT.

To the Honorable Judge of the District Court of the United States, for the District of Idaho, Southern Division:

William Leonard, a citizen of the State of Idaho, residing in Blaine County, said State, brings this, his bill of complaint, against Clara Mills, W. P. Eastwood, A. J. Sullivan, Ceth D. Peacock, John C. Baugh, T. J. Reed, Joseph W. Fuld, Andrew McMonigle, Mrs. P. Donohue, Mrs. M. M. Tipton, Frank McDaniels, Russel B. Westman, Fred H. Povey, Louis Joe, Ching Bing, Harris Furniture Co., Mrs. C. E. Harris, Jim Riggi, E. R. Richards, Hailey Hose Co., Charles Cuneo, Frank Morris, Hailey Butcher Co., L. J. McConnell, Julia Haupt, John Mizer, John Seymour, Mrs. T. Povey, W. J. Oliver, Pelky & Co., John Pugel, Enrique E. Joywecheo, Margaret Sutherland, Ellen Walker, H. Whitmore, Augustus Anacabee, Vincente Guisasola, Maggie J. Porter, F. R. Gooding, assignee of Richard Jones and E. H. Baker, Charles Cuneo, assignee of Fidela Rsteinsia, Leo Bott, Thomas Johnson, Louis D. Paoli, and Giulio Pallinio, Peter Snider, assignee of G. Guigliani, Mark Faladora, C. Juliean and Joe Fereta, F. W. Nitschke, Treasurer of F. O. E. Lodge, Sullivan & Sullivan, assignee of I. N. Sullivan, J. J. McFadden, administrator, with will annexed, of the estate of Frank E. Foote, deceased, McFadden & Brodhead, Trustees, M. E. Mallory, Treasurer of Hailey Baseball Club, E. Daft, Receiver of Idaho State Bank,

Assignee of J. S. Whitton, L. A. Dithmer, J. M. McPherson, Robert Franklin, J. F. McCoy, E. W. Kleinman, Friedman Company, Ltd., a corporation, Lucile Friedman, S. J. Benson, Aukema Drug Company, M. J. Daly, Bellevue State Bank, a corporation, assignee of Jos. Werry, Harry J. Allen, Mrs. W. J. Lamme, W. J. Lamme, Annie I. Harris (formerly Annie I. Miller), and American Surety Company of New York, a corporation, and thereupon your orator complains and alleges:

I.

That he is the identical William Leonard who is plaintiff in a certain action at law now pending in this court, entitled State of Idaho, to and for the use and benefit of William Leonard, plaintiff, versus American Surety Company of New York, a corporation, defendant, which action was brought to recover from the said defendant, American Surety Company of New York, the sum of \$9,656.93, with interest thereon at the rate of 7% per annum from September 1, 1912, under the penalty contained in that certain bond given by the said American Surety Company of New York as surety for one William G. Cruse, as Bank Commissioner of the State of Idaho, a copy of which said bond is hereto annexed, marked Exhibit "A," and made a part hereof. That the State of Idaho has no interest whatsoever in said action but the same is prosecuted for the sole use and benefit of your orator, and this suit in equity is brought by your orator as ancillary to the said action

at law, now pending and undetermined in this court as aforesaid, and for the purpose of preserving and protecting the rights of your orator under said bond and in said action at law until said action at law can be finally determined.

II.

That on or about the 6th day of March, 1909, the Governor of the State of Idaho appointed said William G. Cruse as Bank Commissioner, in and for the State, and thereafter and on or about the 15th day of March, 1909, under the provisions of the statutes of Idaho in such cases made and provided the said William G. Cruse, as principal, and the said defendant, American Surety Company of New York, as surety, executed to the State of Idaho that certain bond or obligation in writing, a copy of which is hereto attached as Exhibit "A," and thereupon the said William G. Cruse assumed the duties of the office of Bank Commissioner of the State of Idaho.

III.

That on the 31st day of August, 1910, and while the said William G. Cruse was Bank Commissioner of the State of Idaho and while the said bond was in full force and effect, the Idaho State Bank of Hailey, Idaho, closed its doors and suspended payment and then was and for some time theretofore had been insolvent and unable to meet the demands of its creditors or to pay its depositors in the ordinary and usual course of business or at all.

That at the time said Idaho State Bank so closed its doors and suspended payment and for some time prior thereto your orator and the defendants hereinbefore named, except the said American Surety Company of New York, were depositors and creditors of said bank to an amount aggregating \$75,000 or more, the exact amount thereof being to your orator unknown.

That on or about the 31st day of August, 1912, the State of Idaho commenced an action in the District Court of the Fourth Judicial District of the State of Idaho, in and for Blaine County, to and for the use and benefit of certain of said defendants, to-wit: Clara Mills, W. P. Eastwood, A. J. Sullivan, Ceth D. Peacock, John C. Baugh, T. J. Reed, Joseph W. Fuld, Andrew McMonigle, Mrs. P. Donohue, Mrs. M. M. Tipton, Frank McDaniels, Russel B. Westman, Fred H. Povey, Louie Joe, Ching Bing, Harris Furniture Co., Mrs. C. E. Harris, Jim Riggi, E. R. Richards, Hailey Hose Co., Charles Cuneo, Frank Morris, Hailey Butcher Co., L. J. McConnell, Julia Haupt, John Mizer, John Seymour, Mrs. T. Povey, W. J. Oliver, Pelky & Co., John Pugel, Enrique E. Joywecheo, Margaret Sutherland, Ellen Walker, H. Whitmore, Augustus Anacabee, Vincente Guisasola, Maggie J. Porter, F. R. Gooding, Assignee of Richard Jones and E. H. Baker, Charles Cuneo, Assignee of Fidela Rsteinsia, Leo Bott, Thomas Johnson, Louis D. Paoli, and Giulio Pallinio, Peter Snider, Assignee of G. Guigliani, Mark Faladora, C. Juliean and Joe

Fereta, F. W. Nitschke, Treasurer of F. O. E. Lodge, Sullivan & Sullivan, Assignee of I. N. Sullivan, J. J. McFadden, Administrator, with will annexed of the estate of Frank E. Foote, deceased, McFadden & Brodhead, Trustees, M. E. Mallory, Treasurer of Hailey Baseball Club, E. Daft, Receiver, Assignee of J. S. Whitton, against the defendant, American Surety Company of New York, to recover from said American Surety Company under the penalty specified in said bond the moneys which the defendants above named were alleged to have had on deposit in said bank at the time it closed its doors or suspended payment, which action resulted in a judgment in favor of the State of Idaho, to and for the use and benefit of the said named defendants (plaintiffs in said action), for a total or aggregate sum of \$22,624.33, such judgment being entered on or about the 19th day of May, 1913.

IV.

That the judgment so obtained in the action commenced to and for the use and benefit of the defendants named in paragraph three thereof was a default judgment obtained without a trial of the case on the merits, the default of said American Surety Company of New York having been entered in said cause by the Clerk of said state court on or about the 16th day of October, 1912, while said defendant, American Surety Company of New York was removing said cause pursuant to the provisions of Section 29 of the Judicial Code of the United States to

the Federal court for the district in which said action was pending, and as your orator is informed and believes, said default was entered contrary to and in violation of the provisions of said Section 29 and other sections of said Judicial Code of the United States, and no defense to said action was therefore made by the defendant, American Surety Company of New York.

V.

That on or about the 30th day of August, 1913, the State of Idaho commenced an action in said District Court of the Fourth Judicial District of the State of Idaho in and for Blaine County against the said American Surety Company of New York, under the penalty specified in said bond (Exhibit "A"), for the use and benefit of certain of the defendants above named, to-wit: L. A. Dithmer, J. M. McPherson, Robert Franklin, J. F. McCoy, E. W. Kleinman, Friedman Company, Ltd., Lucile Friedman, S. J. Benson, Aukema Drug Company, M. J. Daly, Bellevue State Bank, Assignee of Jos. Werry, Harry J. Allen, Mrs. W. J. Lamme, W. J. Lamme, and Annie I. Harris (formerly Annie I. Miller), for the amount which it was alleged the said defendants had on deposit in said Idaho State Bank of Hailey, Idaho, on August 31, 1910, when said bank closed its doors or suspended payment, aggregating approximately \$45,000, with interest thereon from the 1st day of September, at the rate of 7% per annum, which said action is still pending undetermined in said state court.

VI.

That the judgment so recovered in said state court for the said sum of \$22,624.33, with accumulated interest thereon, and the amount claimed in said action now pending and undetermined in said state court, with interest thereon at the rate claimed by said defendant, to-wit, 7% per annum from September 1, 1910, and the amount claimed in the action now pending in this court, wherein your orator is the real and actual plaintiff, to recover the sum of \$9,656.93, with interest thereon, aggregate an amount, to-wit, approximately \$41,000 in excess of the total penalty of the said bond, Exhibit "A," and all of said actions were, or are, being brought or maintained under said Exhibit "A" and the penalty thereof.

VII.

That the defendants named in paragraph three hereof, for whose use and benefit the said default judgment of \$22,624.33 was recovered as aforesaid, have received since said judgment was entered and had received prior to the entry of said judgment, as your orator is informed and believes and so charges the fact to be, certain dividends paid them by the Receiver of the Idaho State Bank of Hailey, Idaho, on account of the deposits which said defendants claimed to have had in said bank at the time it suspended payment, which dividends, as your orator is informed and believes, had not been credited on the claims of said defendants against the defendant, American Surety Company of New York under said

bond, and have not been credited on the judgment so obtained, but the said defendants now threaten and intend to proceed to enforce said judgment for the full amount thereof, without making any allowance or credit for the dividends so received and aggregating upwards of \$4,000 or more, as your orator is informed and believes, and regardless of the claims of this complainant and the other defendants mentioned in paragraph five hereof, and will enforce said judgment for the full amount thereof against said American Surety Company of New York without regard to the rights and equities of your orator and the other defendants herein named, unless restrained from so doing by this honorable court until the respective rights of all of the parties hereto have been determined and the aggregate of all valid claims against said Surety Company, under said Exhibit "A," has been ascertained and determined and an accounting had of the dividends received by the defendants named in paragraph three hereof, which in equity and good conscience should be credited upon said judgment.

VIII.

That the aggregate of the amount claimed by the defendants named in paragraph three hereof and by the defendants named in paragraph five hereof exceeds the total amount of the penalty of said bond by approximately \$29,000.

That your orator was not a party to the action brought for the use and benefit of the defendants

named in paragraph three hereof, wherein such default judgment was recovered against the said American Surety Company of New York for the sum of \$22,624.33, and your orator should not, therefore, in law or equity be bound by said judgment, and if the said defendants be permitted to enforce said judgment for the full amount thereof against the said American Surety Company of New York, the remainder of the penalty specified in said bond will be wholly insufficient to pay the claims of your orator and the defendants named in paragraph five hereof whose claims aggregate more than the full penalty of said bond and any payment made on account of the judgment so obtained as aforesaid is in effect a payment to said defendants by your orator and by the defendants named in paragraph five herein, and if said defendants named in paragraph three hereof are permitted to enforce said judgment for the full amount thereof, under the penalty named in said bond, your orator will be injured and suffer a loss to an amount of approximately \$5,000.

That because of the illegal and unlawful manner in which said judgment was obtained without a trial of the cause on the merits and because of the fact that your orator was not a party defendant thereto and was never permitted to contest any of the claims of the defendants named in said paragraph three and on which said judgment is based, and because of the fact that the dividends received by said defendants have not been credited on said judgment or applied to the reduction of said claims, said judgment should

be held and decreed void and inoperative as against your orator and your orator should not be required to pro-rate his claim with said judgment or to take his pro-rata part of the penalty of said bond with the defendants named in paragraph three hereof, based on said judgment, until the amount actually due and owing to said defendants has been ascertained and determined in a proceeding to which your orator is a party, and until such determination has been had and an account has been taken of the dividends received by said defendants, or any of the parties to this cause, from the Receiver of said Idaho State Bank, the defendant, American Surety Company of New York, should be restrained and enjoined from making any payments whatsoever on account of said judgment, or to any of the defendants herein or parties hereto.

IX.

That the rights of the several depositors in said Idaho State Bank, beneficiaries under the penalty of said bond (Exhibit "A"), as among themselves relate back to the execution of said bond and arise by relation out of the same transaction and as of the same date, and in equity all of the parties hereto who may have rights under said bond stand in the same relation to each other without preference or priority of one claim over another, and each is in equity as well as under the law entitled only to his equitable or pro-rata part of the penalty specified in said bond based upon the aggregate of the valid claims that

may be entitled to share in the proceeds from said penalty.

X.

That your orator fears, and has reason to fear, that the defendants named in paragraph five hereof may also recover judgment prior to the determination of the action now pending undetermined in this court, prosecuted for the use and benefit of your orator against the said American Surety Company of New York, and that such judgment together with the judgment obtained as aforesaid by or for the defendants named in paragraph three hereof will aggregate an amount largely in excess of the full penalty of said bond, and if the said defendant, American Surety Company of New York, should pay said judgments, the full penalty of said bond will be exhausted to your orator's great and irreparable injury and your orator cannot be protected in the premises and have the relief which he is, in law and equity, justly entitled unless the defendants named in paragraph three and in paragraph five hereof be enjoined and restrained from collecting, and the said American Surety Company of New York be enjoined and restrained from paying, the claims made against said Surety Company on account of said bond, until your orator's claim has been fully established and an accounting had, and the amount of all valid claims outstanding and enforceable under said bond ascertained and determined.

XI.

That the defendant, American Surety Company of New York, has an unimpaired capital and surplus of several million dollars and is financially responsible for any and all amounts that may be recovered against it under said bond but your orator is informed and believes that unless said Surety Company be restrained or enjoined or protected against the enforcement of the judgment obtained as aforesaid, it will pay the same in full and your orator will thereby sustain great loss and irreparable injury and the action at law being prosecuted for your orator's use and benefit in this court may become a wholly fruitless proceeding.

XII.

That in the actions at law now pending in this court and in the said state court as well as in the action wherein judgment was recovered as aforesaid, the State of Idaho is named as plaintiff but it is alleged in the complaint in each of said actions that said actions are prosecuted in and for the use and benefit of the parties therein named and that the State of Idaho has no interest whatsoever in said proceedings or in the claims therein mentioned or in the proceeds of any judgments that may be recovered in said actions.

In Consideration Whereof, and for as much as your orator is remediless in the premises according to the strict course of the common law and can only have relief in a court of equity, your orator prays the aid of this honorable court, as follows:

(a) That it be held, adjudged and decreed that the judgment recovered by the defendants named in paragraph three hereof, or for the use and benefit of said defendants, against the said American Surety Company of New York, for the sum of \$22,624.33, be held void, unenforceable and ineffectual as against your orator and that your orator shall not be held or required to pro-rate his claim with said judgment and that said defendants are not entitled to recover more than their pro-rata part of the penalty of said bond based upon the aggregate of all valid claims that may be established under said bond and entitled to share in the proceeds of the penalty thereof and that in determining the aggregate amount of such claims, all dividends received on account of said claims from the Receiver of the Idaho State Bank of Hailey by said defendants shall be credited on said claims or any judgments recovered thereon against the said surety.

(b) That the defendants named in paragraph three of this bill of complaint, and each of them, their agents, attorneys and employes, and all persons acting by, for and under them, or either of them, be forthwith restrained and enjoined by this court from enforcing the judgment recovered as aforesaid against the said defendant, American Surety Company of New York, until the action now pending in this court wherein your orator is plaintiff and the said defendant, American Surety Company of New York is defendant, and the action pending in the said District Court of the Fourth Judicial District

of the State of Idaho, in and for Blaine County, which is prosecuted for the use and benefit of the defendants named in paragraph five of the bill herein against the defendant, American Surety Company of New York, have been finally determined and an accounting had and the amount of the valid claims against said surety on account of said bond ascertained and determined.

(c) That an accounting may be taken in this behalf under the direction of this court of the whole of the indebtedness due and owing from the said defendant, American Surety Company of New York, under said bond, in favor of the several claimants and of the dividends received by the several claimants, beneficiaries under said bond, and the amount payable to each of said claimants out of the penalty specified in said bond ascertained and determined.

(d) That your orator have such other and further relief in the premises as the nature of the case may require and as shall be proper and agreeable to the principles of equity and this court.

And may it please your honors to grant unto your orator a writ or writ of subpoena and other processes directed to the Marshal of said district, commanding him that he summon the defendants above named to be and appear in this court on a certain day therein named and under a certain penalty therein to be limited and stated, and then and there, singly and severally, to make full, true and direct answer to this bill of complaint (but not under oath,

such answer under oath being expressly waived as to each of said defendants), and to show cause, if any they have, why the prayer of this bill of complaint should not be granted, according to the rules and practices of this honorable court, and to stand ready to perform and abide by such order, direction or decree as may be made against them in the premises and as to this honorable court shall seem meet.

And this your orator will ever pray.

WILLIAM LEONARD,

By J. G. Hedrick,

Edwin Snow,

(Duly verified.)

His Solicitors.

EXHIBIT "A."

AMERICAN SURETY COMPANY
OF NEW YORK

CAPITAL AND SURPLUS, \$5,000,000.00.

BANK COMMISSIONER'S BOND.

Know All Men by These Presents: That we, William G. Cruse, of Boise, Ada County, State of Idaho, as principal, and the American Surety Company of New York, a corporation of the State of New York, and doing business in the State of Idaho, as surety, are held and firmly bound unto the State of Idaho in the sum of Fifty Thousand (\$50,000.00) Dollars, lawful money of the United States of America, to be paid to the said State of Idaho, for which payment, well and truly to be made, said principal binds himself, his heirs, executors and administrators, and

said surety binds itself and successors jointly and severally, firmly by these presents.

Sealed with our seals and dated this 15th day of March, A. D. 1909.

The Condition of the above obligation is such that, Whereas, the above bounden principal, William G. Cruse, was on the 6th day of March, 1909, appointed State Bank Commissioner in and for the State of Idaho for a term of four years, from March 6th, 1909, unless sooner removed.

Now Therefore, if the said William G. Cruse shall well, faithfully and impartially discharge the duties of his office and pay over to the person entitled by law to receive it, all money coming into his hands by virtue of his office, and that he will pay any and all damages and costs that may be adjudged against him under the provisions of Chapter 12, Title 2, Political Code and Chapter 13, Title 4, of the Civil Code of Idaho, and shall well and truly perform all the duties of such office required by any law to be enacted subsequently to the execution of this bond, then this obligation to be void, otherwise to remain in full force and effect.

WM. G. CRUSE.

AMERICAN SURETY COMPANY
OF NEW YORK,

By WESLEY KING,

(Seal)

Res. Vice President.

Attest: Bradley Sheppard, Agent, Boise, Idaho.

Attest: Stanley Whitehead, Res. Asst. Secretary.

“O. K. McDougal.”

AMERICAN SURETY COMPANY
OF NEW YORK

CAPITAL AND SURPLUS \$5,000,000.00.

State of Utah,

County of Salt Lake.—ss.

On the 15th day of March, 1909, personally appeared before me, Wesley E. King, Resident Vice President of the American Surety Company of New York, to me known, who being by me duly sworn did depose and say: That he resided in the City of Salt Lake, State of Utah; that he is the Resident Vice President of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Trustees of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said Wesley E. King further said that he was acquainted with Stanley Whitehead and knew him to be one of the Resident Assistant Secretaries of said corporation, that the signature of said Stanley Whitehead subscribed to the said instrument is in the genuine handwriting of the said Stanley Whitehead and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him, the said Wesley E. King, Resident Vice President.

WESLEY E. KING.

Subscribed and sworn to before me this 15th day of March, 1909.

(Seal)

ROBERT F. HERRON,
Notary Public.

My commission expires Aug. 20th, 1912.

(Attached thereto is an extract from the record book of the Board of Trustees of the American Surety Company of New York.)

Endorsed: Filed May 6, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

IN EQUITY—NO. 529.

(Title of Court and Cause.)

MOTION FOR PRELIMINARY INJUNCTION.

Now Comes the complainant in the above-entitled suit, by its solicitors, Messrs. Richards & Haga and McKeen F. Morrow, and moves this Honorable Court to grant a Writ of Injunction against said defendants, and each of them, their agents, attorneys, clerks and employees, pending this suit and until the further order of the Court, conformable to the prayer of complainant's Bill in this cause, and pending the hearing of said motion for preliminary injunction complainant further moves this Honorable Court to restrain the said defendants, and each of them, conformable to the prayer of said Bill.

This motion is based upon complainant's verified Bill and on the Bill of William Leonard in Equity Cause No. 530 against the said Clara Mills et al.,

defendants, wherein similar relief is sought by the said William Leonard.

RICHARDS & HAGA,
McKEEN F. MORROW,
Solicitors for Complainant,
Residence: Boise, Idaho.

Endorsed: Filed May 6, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

IN EQUITY—NO. 529.
(Title of Court and Cause.)
MOTION TO DISMISS.

Come Now the defendants herein, Sullivan & Sullivan, assignees of I. N. Sullivan, by L. L. Sullivan and W. E. Sullivan, their solicitors, and move the Court to dismiss the Bill of Complaint herein for the following reasons, to-wit:

1. That the said Bill of Complaint shows upon its face that this Court has no jurisdiction of the subject matter of the cause of action therein set forth, or of the parties herein.

2. That the Bill of Complaint herein fails to show that the default judgment entered in the action of the State of Idaho, to and for the use and benefit of Clara Mills et al., against the American Surety Company, in the District Court of the Fourth Judicial District of the State of Idaho, in and for Blaine County, was made and entered against said Company through any excusable accident or mistake but was entered by reason of its own fault and neglect.

3. That a Federal Court will not restrain the collection of a judgment at law rendered by a State Court, which had complete jurisdiction of the parties and subject matter, upon the ground that the judgment was rendered through such accident and mistake, facts and circumstances, as alleged in the Bill of Complaint herein.

4. That the Bill of Complaint herein fails to allege any meritorious defense that said American Surety Company had in the action in said State Court.

5. That the Bill of Complaint herein shows that said American Surety Company, defendant in the said action in said State Court, lost its right to present any meritorious defense it might have had in said action by reason of its own fault and neglect.

6. That it appears from the Bill of Complaint herein that the American Surety Company, defendant in said action in said State Court, had a plain, speedy and adequate remedy at law for the matters complained of herein, and pursued the same by application in the original Court to vacate and set aside the default entered in said action, and therefore, the decision of the State Court upon said application adjudicating said matters against said Company, which remains unreversed, is *res adjudicata*, final and conclusive; that the judgment rendered and entered in said action in said State Court, after said default, which is sought to be avoided herein, and collection thereof restrained, was duly rendered by a Court of

competent jurisdiction, remains unreversed and is therefore final, conclusive and *res adjudicata*, and a bar to the action herein.

7. That a Federal Court will not grant relief in equity against judgments at law rendered in a State Court by enjoining the enforcement thereof, where the proceeding, as in the action herein, is merely tantamount to enjoining the enforcement of a judgment of the State Court for errors or irregularities, or which would amount to a mere revision of errors and irregularities or of the legality and correctness of the judgment of the State Court.

8. For want of equity, in that the complainant herein has not by its Bill of Complaint alleged such a case as entitles it in a Court of Equity to relief, or any thereof, touching the matters in said complaint, or any such matters.

9. That the facts stated in said Bill of Complaint are insufficient to constitute a valid cause of action, or to entitle the complainant to any relief in a Court of Equity.

Dated: May 22nd, 1915.

L. L. SULLIVAN,

W. E. SULLIVAN,

Residence: Boise, Idaho,

Solicitors for Defendants.

SULLIVAN & SULLIVAN,

Assignee of I. N. Sullivan.

Service of copy of the foregoing Motion admitted this 24th day of May, 1915.

RICHARDS & HAGA,

Attorneys for Complainant.

Endorsed: Filed May 24th, 1915. A. L. Richardson, Clerk.

IN EQUITY—NO. 529.

(Title of Court and Cause.)

MOTION TO DISMISS.

Comes Now the defendant herein, George F. Steele, Insurance Commissioner of the State of Idaho, by his solicitor, J. H. Peterson, Attorney General for the State of Idaho, and moves the Court to dismiss the Bill of Complaint herein for the following reasons, to-wit:

I.

That said Bill of Complaint shows upon its face that this Court has no jurisdiction of the subject matter of the cause of action therein set forth, or of the parties herein.

II.

For want of equity, in that the complaint herein has not by its Bill of Complaint alleged such a case as entitles it in a Court of Equity to relief, or any thereof, touching the matters in said complaint, or any such matters.

III.

That the facts stated in said Bill of Complaint are insufficient to constitute a valid cause of action, or

to entitle the complainant to any relief in a Court of Equity.

Dated: May 25th, 1915.

J. H. PETERSON,
Residence: Boise, Idaho,
Attorney General for the State of Idaho,
and Solicitor for Said Defendant.

Service of copy of the above motion admitted this
25th day of May, 1915.

RICHARDS & HAGA,
Attorneys for Complainant.

Endorsed: Filed May 25th, 1915. A. L. Richardson, Clerk.

IN EQUITY—NO. 529.
(Title of Court and Cause.)
MOTION TO DISMISS.

Come Now the defendants herein, Clara Mills, W. P. Eastwood, A. J. Sullivan, Ceth D. Peacock, John C. Baugh, T. J. Reed, Joseph W. Fuld, Andrew McMonigle, Mrs. P. Donohue, Mrs. M. M. Tipton, Frank McDaniels, Russel B. Westman, Fred H. Povey, Louie Joe, Ching Bing, Harris Furniture Co., Mrs. C. E. Harris, Jim Riggi, E. R. Richards, Hailey Hose Co., Charles Cuneo, Frank Morris, Hailey Butcher Co., L. J. McConnell, Julia Haupt, John Mizer, John Seymour, Mrs. T. Povey, W. J. Oliver, Pelky & Co., John Pugel, Enrique E. Joywecheo, Margaret Sutherland, Ellen Walker, H. Whitmore, Augustus Anacabee, Vincente Guisasola, Maggie J.

Porter, F. R. Gooding, assignee of Richard Jones and E. H. Baker, Charles Cuneo, assignee of Fidela Rst-einsia, Leo Bott, Thomas Johnson, Louis D. Paoli and Giulio Pallinio, Peter Snider, assignee of G. Guigliani, Mark Faladora, C. Juliean and Joe Fereta, E. W. Nitschke, Treasurer of F. O. E. Lodge, J. J. McFadden, Administrator, with Will annexed, of the estate of Frank E. Foote, deceased, McFadden & Brodhead, Trustees, M. E. Mallory, Treasurer of Hailey Baseball Club, E. Daft, receiver of Idaho State Bank, assignee of J. S. Whitton, by L. L. Sullivan and W. E. Sullivan, their solicitors, and move the Court to dismiss the Bill of Complaint herein for the following reasons, to-wit:

1. That said Bill of Complaint shows upon its face that this Court has no jurisdiction of the subject matter of the cause of action therein set forth, or of the parties herein.

2. That the Bill of Complaint herein fails to show that the default judgment entered in the action of the State of Idaho, to and for the use and benefit of Clara Mills, et al., against the American Surety Company, in the District Court of the Fourth Judicial District of the State of Idaho, in and for Blaine County, was made and entered against said company through any excusable accident or mistake but was entered by reason of its own fault and neglect.

3. That a Federal Court will not restrain the collection of a judgment at law rendered by a State Court, which had complete jurisdiction of the parties

and subject matter, upon the ground that the judgment was rendered through such accident and mistake, facts and circumstances, as alleged in the Bill of Complaint herein.

4. That the Bill of Complaint herein fails to allege any meritorious defense that said American Surety Company had in the action in said State Court.

5. That the Bill of Complaint herein shows that said American Surety Company, defendant in the said action in said State Court, lost its right to present any meritorious defense it might have had in said action by reason of its own fault and neglect.

6. That it appears from the Bill of Complaint herein that the American Surety Company, defendant in said action in said State Court, had a plain, speedy and adequate remedy at law for the matters complained of herein, and pursued the same by application in the original Court to vacate and set aside the default entered in said action, and therefore, the decision of the State Court upon said application adjudicating said matters against said Company, which remains unreversed, is *res adjudicata*, final and conclusive; that the judgment rendered and entered in said action in said State Court, after said default, which is sought to be avoided herein, and collection thereof restrained, was duly rendered by a Court of competent jurisdiction, remains unreversed and is therefore final, conclusive and *res adjudicata*, and a bar to the action herein.

7. That a Federal Court will not grant relief in equity against judgments at law rendered in a State Court by enjoining the enforcement thereof, where the proceeding, as in the action herein, is merely tantamount to enjoining the enforcement of the judgment of the State Court for errors or irregularities, or which would amount to a mere revision of errors and irregularities or of the legality and correctness of the judgment of the State Court.

8. For want of equity, in that the complainant herein has not by its Bill of Complaint alleged such a case as entitles it in a Court of Equity to relief, or any thereof, touching the matters in said complaint, or any such matters.

9. That the facts stated in said Bill of Complaint are insufficient to constitute a valid cause of action, or to entitle the complainant to any relief in a Court of Equity.

Dated: October 11th, 1915.

L. L. SULLIVAN,

W. E. SULLIVAN,

Residence: Boise, Idaho.

Solicitors for said Defendants.

Service of a copy of the foregoing Motion admitted this 11th day of October, 1915.

RICHARDS & HAGA,

Solicitors for Plaintiff.

Endorsed: Filed October 11th, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

IN EQUITY—NO. 529.

(Title of Court and Cause.)

DECISION ON MOTION TO DISMISS AND AP-
PLICATION FOR TEMPORARY
INJUNCTION.

September 2, 1915.

Richards & Haga, Attorneys for Plaintiff.

Sullivan & Sullivan, Attorneys for certain De-
fendants.*Dietrich, District Judge:*

By reference to the two remand decisions, one filed December 2, 1912, in No. 424 (State of Idaho, for Clara Mills and others vs. American Surety Company), and the other, in No. 459 (State of Idaho, for William Leonard and others vs. American Surety Company), on October 2, 1914, it will be seen that the action taken in each case was predicated largely, if not entirely, upon the fact that the claims of the real plaintiffs were pleaded as distinct, independent causes of action at law. The latter decision closes with this sentence: "It is hardly necessary to add that if the plaintiff had, in a single cause of action, set forth the facts substantially as they appear in the sixteen different causes of action, and had prayed only for a decree adjudging that, by reason of such facts, the defendant was indebted to the plaintiff, for the use and benefit of the several claimants, in the sum of \$50,000.00, and further that the decree apportion the amount of the recovery to the several claimants as their rights and interests should ulti-

mately appear, the questions discussed would present a different phase."

Starting with the assumption that the conclusions reached in those cases were correct, we may inquire whether the present controversy presents a different jurisdictional aspect. At the close of the oral argument I intimated the view, which I still entertain, that the plaintiff cannot in this proceeding attack the validity of the judgment obtained in the state court by Mills and her associates. No actionable fraud is pleaded, and if it were assumed that the state courts committed error in entering judgment by default before the motion to remand had been disposed of in this court, such error cannot be corrected in a suit of this character. There must be an end of litigation, and the only remedy available to the plaintiff is such as is afforded by appellate proceedings. I therefore put this branch of the bill of complaint on one side as in no wise tending to support our jurisdiction.

As to the other relief sought, the case is clearly of equitable cognizance, and presents the requisite diversity of citizenship. Moreover, insofar as concerns the defendant Steele and the defendant Leonard, the required jurisdictional amount is undoubtedly involved. The real question is, what is to be deemed to be the matter in dispute as between the plaintiff and the other defendants.

The maximum of the plaintiff's just liability, if any it has in the premises, is conceded to be \$50,-

000.00, and yet it is apparent that from proceedings which have been taken and are threatened it is in danger of being held for a greater aggregate sum. Mills and associates contend that they may enforce payment of the full amount of their judgment claims. Leonard and Dithmer and others are asserting the right to receive at least their full proportionate share of the security represented by the plaintiff's bond. The claims thus waged, added together, exceed the amount of the bond by at least \$10,000.00. If the pending actions are permitted to proceed independently and in different courts, it is possible that by reason of a diversity of judicial construction, or possibly as a result of inconsistent views of the facts, the plaintiff may ultimately be compelled to pay all of the claims, though they aggregate an amount greatly in excess of its legal liability. Against this possibility it seeks to be protected by compelling all claimants to come into the same tribunal, and, in a single action, have a comprehensive decree defining and concluding all claims. True, plaintiff goes further and denies liability in toto, but that phase of its contention may be ignored. Were that the only issue, and were the penalty of the bond in excess of the aggregate of all claims, it might very well be held that the case is one of neither equitable nor federal cognizance. Upon such an hypothesis there would be no relation of interdependence, no community of interest, between the several claimants. Each could maintain his own action in his own way, to recover the full amount of his claim, and his recovery would

in no wise infringe upon or jeopardize the rights of any other claimant. Such were the conditions under which the motions to remand were granted. But now a different case is made. Assuming the plaintiff's liability to be the full penalty of the bond, there is a single fund insufficient in amount to satisfy all claims of the same class and of like dignity. A joint interest is shown. The claims are interdependent. To pay one in full is to deny another. The contention that the claims which have gone to judgment in the Mills suit have a preference over the others does not materially alter the case. If sustained, it would imply only a different distribution of the fund. The fund is inadequate in either view to satisfy all claims. If liable at all upon the bond, the plaintiff perhaps has little, if any, interest in the general question of how the fund shall be distributed, but it is deeply interested in having a single principle of distribution prevail at all times and in all tribunals, for, as already suggested, if one court adopts one view and another court another, it may ultimately be compelled to pay in excess of the stipulated penalty. Under the circumstances it is thought that the whole fund may properly be regarded as the matter in dispute. I say the entire fund, for the whole of it is in controversy, and it seems to afford the simplest and most obvious measure of the value of the matter in dispute. It bears some analogy to the property which is the subject of a creditors' suit, and which is insufficient to pay all claims.

If the penalty of the bond is not taken as the measure of the matter in dispute, I am inclined to think that, in view of the facts now shown, all the claims may be aggregated; at least they may be divided into three groups, and each group treated as a unit, namely, the group held by Mills and her associates, the group held by Dithmer and associates, and the claim of Leonard. In either view the amount would be sufficient to confer jurisdiction.

It is earnestly insisted that the status of the claims embraced in the Mills suit remains unaltered, and if the motion to remand was properly granted the motion to dismiss should now be sustained. But not so. The claimants in that case joined as plaintiffs, so it appeared, merely for convenience. There was no joint relation between them, no community of interest. Upon the trial of the cause one might succeed and the others fail. No one in the group had any interest in assisting or opposing any other one. The success in whole or in part of any one in no wise affected the interest of any other. But now by the judgment a joint relation has been created; a measure of interdependence, of community of interest, exists. The claimants now wage common cause for preference against all other claimants. Any money which may be collected on the judgment is not for one, but for all. It must be distributed *pro rata*. As between members of this group at least there can be no assertion of superior rights. The execution against which the plaintiff here seeks protection is not for the benefit of one, but for the joint benefit of

all. In levying they act jointly. Their rights have a common origin, are of the same dignity, and now rest in a single record. They act together through a single agent, to the same end, an end in which they have a joint or common interest. Their interests may therefore properly be aggregated for the purposes of jurisdiction.

Perhaps no decided case can be found in which the facts are closely analogous, but the conclusion I have reached finds substantial support in the following decisions: *Hood v. Board*, 210 Fed. 384; *McDaniel v. Traylor*, 196 U. S. 428; *Marshal v. Holmes*, 141 U. S. 569; *Bank of Troy v. Whitehead*, 222 U. S. 39; *Handley v. Stutz*, 137 U. S. 366.

INJUNCTIVE RELIEF.

Passing now to the plaintiff's application for temporary injunctive relief, it follows from what has already been said that such relief should go no further than to afford protection to the plaintiff against the necessity of paying in excess of the penalty of the bond. Had all claimants been made parties to the Mills suit, the judgment there would have been conclusive, and there would be no ground for granting an injunction; and we cannot now properly go further than to restrain the judgment creditors from so using the judgment as to work an injustice either upon the plaintiff or other claimants, by enforcing the payment of the full amount of the judgment claims before the other claimants have had their day in court. The injunction will therefore not wholly

restrain execution upon the judgment, but will only prohibit the judgment creditors from collecting more than a proportionate interest in the penalty of the bond.

I should add that defendants are in error in assuming that the injunction in any wise interferes with or infringes upon the jurisdiction of the state court. Had the state court exercised jurisdiction over the fund represented by the penalty of the bond, an entirely different question would be presented, but that is just what was not done in the Mills suit. Apparently the plaintiffs there studiously avoided invoking such jurisdiction. As already suggested, they might have instituted a suit in equity, by which the state court could have laid hands upon the entire fund and distributed it to all who were entitled to share therein, as their interests might appear, but instead of pursuing that course they brought an action at law, excluding therefrom others who were apparently equally entitled with them to share in the fund. While the judgment so obtained might, in the absence of claims on the part of persons who were not parties to the suit, be conclusive upon the plaintiff, surely it cannot be held to conclude the rights of creditors who were not made parties to the suit. Even if the view be taken that the judgment is conclusive of the question of the several amounts in which the judgment claimants were damaged by reason of the violation of the Bank Commissioner of the conditions of the bond, a point I do not decide, still

the other claimants would have the right to be heard upon all matters touching the distribution of the fund in which they have an interest. And if, upon a full hearing, in a proceeding to which all claimants are parties, it turns out to be necessary, in order to avoid injustice, to limit the apparent judgment rights of Mills and her associates, that is a consequence for which they themselves are to blame, in that they did not bring into the suit in which they obtained their judgment all parties in interest. Now for the first time a court is asked to assume jurisdiction of the entire fund and make complete distribution thereof, and now for the first time all claims upon this fund are brought into a single proceeding for adjudication. Not only has the state court never had jurisdiction of the fund, but it has never had jurisdiction of or adjudicated any issue as between the several claimants.

An injunctive order will issue against the plaintiffs in the Mills suit, restraining them from collecting more of the \$50,000.00 penalty than would be their proportionate share thereof, assuming that all claims are correctly scheduled in the bill of complaint and are valid. Counsel for the plaintiff may make the necessary computations, and submit the form of order to opposing counsel. The injunction bond will be fixed at \$5,000.00.

The motion to dismiss will be denied.

Endorsed: Filed Sept. 2, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

IN EQUITY—NO. 529.

(Title of Court and Cause.)

ORDER.

This cause came on to be heard upon an order to show cause, issued on the 6th day of May, 1915, why a preliminary injunction should not issue herein, as prayed for in the Bill, Richards & Haga appearing as counsel for plaintiff, and J. H. Peterson, Attorney General for the State of Idaho, appearing as counsel for George F. Steele, Insurance Commissioner of the State of Idaho, and L. L. Sullivan and W. E. Sullivan appearing as counsel for Sullivan & Sullivan; and it appearing that a good and sufficient bond in the penal sum of \$5,000.00, heretofore fixed by the Court, has been filed;

It Is Ordered, that the said defendants, Sullivan & Sullivan, Assignee of I. N. Sullivan, and their agents, attorneys and assigns, and all persons acting for them, or either of them, are hereby restrained and enjoined from enforcing that certain judgment mentioned in the Bill, or taking any action whatsoever for the collection of more of the penalty of that certain bond, given by William G. Cruse, as principal, and the said plaintiff, American Surety Company, as surety, to the State of Idaho, dated the 15th day of March, A. D. 1909, a copy of which is attached to the Bill, than would be their proportionate share of Thirteen Thousand Six Hundred and Fourteen Dollars (\$13,614.00).

And the defendant, George F. Steele, Insurance

Commissioner of the State of Idaho, and his deputies and assistants, successor or successors in office, and all persons acting for him or in his place or stead, be, and they are hereby, restrained and enjoined from cancelling, revoking, annulling, or in any wise impairing the certificate, right or authority of the complainant, American Surety Company of New York, from doing business in the State of Idaho as a Surety Company, or otherwise, because of its failure to pay the judgment recovered by the State of Idaho, for the use and benefit of said Clara Mills and others, above named, or any part thereof, until the further order of the Court in the premises.

Dated this 9th day of October, 1915.

FRANK S. DIETRICH,

Judge.

Endorsed: Filed Oct. 9, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

IN EQUITY—NO. 529.

(Title of Court and Cause.)

ORDER.

This cause came on to be heard upon an order to show cause, issued on the 6th day of May, 1915, why a preliminary injunction should not issue herein, as prayed for in the Bill, Richards & Haga appearing as counsel for plaintiff, and L. L. Sullivan and W. E. Sullivan appearing as counsel for the defendants hereinafter named; and it appearing that a good and

sufficient bond in the penal sum of \$5,000.00, heretofore fixed by the Court, has been filed;

It Is Ordered, that the said defendants, Clara Mills, W. P. Eastwood, A. J. Sullivan, Ceth D. Peacock; John C. Baugh, T. J. Reed, Joseph W. Fuld, Andrew McMonigle, Mrs. P. Donohue, Mrs. M. M. Tipton, Frank McDaniels, Russel B. Westman, Fred H. Povey, Louie Joe, Ching Bing, Harris Furniture Co., Mrs. C. E. Harris, Jim Riggi, E. R. Richards, Hailey Hose Co., Charles Cuneo, Frank Morris, Hailey Butcher Co., L. J. McConnell, Julia Haupt, John Mizer, John Seymour, Mrs. T. Povey, W. J. Oliver, Pelky & Co., John Pugel, Enrique E. Joywecheo, Margaret Sutherland, Ellen Walker, H. Whitmore, Augustus Anacabee, Vincente Guisasola, Maggie J. Porter, F. R. Gooding, Assignee of Richard Jones and E. H. Baker, Charles Cuneo, Assignee of Fidela Rsteinsia, Leo Bott, Thomas Johnson, Louis D. Paoli and Giulio Pallinio, Peter Snider, Assignee of G. Guigliani, Mark Faladora, C. Juliean and Joe Fereta, F. W. Nitschke, Treasurer of F. O. E. Lodge, J. J. McFadden, Administrator, with will annexed, of the estate of Frank E. Foote, deceased, McFadden & Brodhead, Trustees, M. E. Mallqry, Treasurer of Hailey Baseball Club, and E. Daft, Receiver Idaho State Bank, assignee of J. S. Whitton, and their agents, attorneys and assigns, and all persons acting for them, or either of them, are hereby restrained and enjoined from enforcing that certain judgment mentioned in the Bill, or taking any action whatsoever for the collection of more of the penalty of that

certain bond, given by William G. Cruse, as principal, and the said plaintiff, American Surety Company, as surety, to the State of Idaho, dated the 15th day of March, A. D. 1909, a copy of which is attached to the Bill, than would be their proportionate share of Thirteen Thousand Six Hundred and Fourteen Dollars (\$13,614.00).

Dated this 14th day of October, 1915.

FRANK S. DIETRICH,

Judge.

Endorsed: Filed October 14, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy Clerk.

(Title of Court and Cause.)

BOND ON PRELIMINARY INJUNCTION.

Know All Men by These Presents, That we, American Surety Company of New York, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto the defendants named in the above-entitled cause, in the just and full sum of Five Thousand Dollars (\$5,000.00) for the payment of which, well and truly to be made, we do hereby, jointly and severally, bind ourselves and each of our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 8th day of October, in the year of our Lord one thousand nine hundred and fifteen.

The condition of this obligation is such, that:

Whereas, the said American Surety Company of

New York has commenced a certain suit against the above-named defendants in the United States District Court for the District of Idaho, Southern Division, and therein prayed for a preliminary injunction against the defendants pending the trial of said suit; and,

Whereas, the said court has issued its said preliminary injunction in said cause, upon condition that the said complainant shall cause to be executed a good and sufficient bond to the said defendants for the sum of Five Thousand Dollars (\$5,000.00) to secure them against all costs and damages which may be awarded to them in case said order shall be finally determined to have been improperly granted.

Now, Therefore, if the said American Surety Company of New York shall make its said plea good, or shall well and truly pay the said defendants all costs and damages which may be awarded to them in case said court shall finally determine that said order was improperly granted, then this obligation shall be void; otherwise, to remain in full force and effect.

AMERICAN SURETY COMPANY
OF NEW YORK,

(Corporate Seal) By Bradley Sheppard,
Resident Vice President.

Attest: McKen F. Morrow, Resident Assistant
Secretary.

FIDELITY AND DEPOSIT COM-
PANY OF MARYLAND,

(Corporate Seal) By Sidney C. Fuld,
Its Attorney in Fact.

Attest: Walter S. Bruce, General Agent.

Approved Oct. 9th, 1915. Frank S. Dietrich,
Judge.

Endorsed: Filed Oct. 9, 1915. A. L. Richardson,
Clerk. By Pearl E. Zanger, Deputy.

IN EQUITY—NO. 529.

(Title of Court and Cause.)

ORDER DENYING MOTION TO DISMISS.

This cause came on to be heard upon the motion to dismiss, filed by defendants Clara Mills, W. P. Eastwood, A. J. Sullivan, Ceth D. Peacock, John C. Baugh, T. J. Reed, Joseph W. Fuld, Andrew McMonigle, Mrs. P. Donohue, Mrs. M. M. Tipton, Frank McDaniels, Russel B. Westman, Fred H. Povey, Louie Joe, Ching Bing, Harris Furniture Co., Mrs. C. E. Harris, Jim Riggi, E. R. Richards, Hailey Hose Co., Charles Cuneo, Frank Morris, Hailey Butcher Co., L. J. McConnell, Julia Haupt, John Mizer, John Seymour, Mrs. T. Povey, W. J. Oliver, Pelky & Co., John Pugel, Enrique E. Joywecheo, Margaret Sutherland, Ellen Walker, H. Whitmore, Augustus Anacabee, Vincente Guisasola, Maggie J. Porter, F. R. Gooding, assignee of Richard Jones and E. H. Baker, Charles Cuneo, assignee of Fidela Rsteinsia, Leo Bott, Thomas Johnson, Louis D. Paoli and Giulio Pallinio, Peter Snider, assignee of C. Guigliani, Mark Faladora, C. Juliean and Joe Fereta, F. W. Nitschke, Treasurer of F. O. E. Lodge, J. J. McFadden, administrator, with will annexed, of the estate of Frank E. Foote,

deceased, McFadden & Brodhead, trustees, M. E. Mallory, Treasurer of Hailey Baseball Club, and E. Daft, Receiver of Idaho State Bank, assignee of J. S. Whitton, on the 11th day of October, 1915; and it appearing that the same questions are raised by said motion as are raised by the motion of the defendants L. L. Sullivan and W. E. Sullivan, which motion was denied by this Court in a decision rendered September 2nd, 1915;

Now, Therefore, It Is Ordered, that the said motion of the above named defendants to dismiss the complaint herein be denied.

Dated this 14th day of October, 1915.

FRANK S. DIETRICH,

Judge.

Endorsed: Filed Oct. 14, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy Clerk.

IN EQUITY—NO. 529.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

And Now Comes the complainant, American Surety Company of New York, a corporation, by its solicitors, and, having presented an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the interlocutory order and decree made and entered in the above entitled cause on the 9th day of October, 1915, partially refusing an injunction preliminary to final hearing herein against

the defendants Sullivan & Sullivan, and from the interlocutory order and decree made and entered in said cause on the 14th day of October, 1915, partially refusing an injunction preliminary to final hearing herein against certain of the above named defendants, and from the decision made and filed by the Court in this cause on the 2nd day of September, 1915, says that said orders and decrees of October 9th and October 14th, 1915, and said decision of September 2, 1915, are erroneous and unjust to complainant, and particularly in this:

1. Because the Court erred in holding and deciding that the full relief prayed for in the Bill of Complaint should not be granted.

2. Because the Court erred in holding and deciding that the defendants Sullivan & Sullivan, assignees of I. N. Sullivan, should not be enjoined, preliminary to final hearing herein, from collecting or enforcing the collection, or taking any steps whatsoever for collecting on the penalty of that certain bond, described in the complaint herein, their proportionate share of \$13,614.00.

3. Because the Court erred in holding and deciding that the defendants named in said interlocutory order and decree made and entered October 14, 1915, should not be enjoined and restrained, preliminary to final hearing herein, from collecting or enforcing the collection, or taking any steps whatsoever for collecting on the penalty of that certain bond, described in the complaint herein, their proportionate share of \$13,614.00.

4. Because the Court erred in holding and deciding that the said defendants, and each of them, could collect their proportionate share of \$13,614.00 on the judgment obtained by them from the District Court of the Fourth Judicial District of the State of Idaho, in and for Blaine County, prior to final hearing herein and the taking of an account.

5. Because the Court erred in holding and deciding that each of said defendants could collect their proportionate share of the sum of \$13,614.00 on said judgment without accounting for the dividends collected and received by them, as set forth in the Bill of Complaint herein.

6. Because the Court erred in holding and deciding that the said defendants, and each of them, should not be enjoined and restrained, preliminary to final hearing, from collecting on said judgment and the penalty of said bond their proportionate share of \$13,614.00 without accounting for dividends collected and received by them, as set forth in the Bill of Complaint herein.

7. Because the Court erred in refusing a preliminary injunction restraining the collection of the sum of \$13,614.00 on the above mentioned judgment and penalty, pending an accounting and final hearing herein.

8. Because the Court erred in refusing an injunction restraining the collection of the above-mentioned judgment, and the whole thereof, under the allegations in the Bill that such judgment was taken by default after plaintiff had appeared by serving the

written notice of the petition and bond for removal required by Section 29 of the Federal Judicial Code and pending the determination of the right of removal by the Federal Court.

9. Because the Court erred in not holding that the default taken in the State Court was premature, and that the State Court had no jurisdiction pending a determination of the right of removal by the Federal Court under the provisions of Section 29 of the Federal Judicial Code.

10. Because the Court erred in holding that the State Court had jurisdiction to proceed in the cause, pending the determination of the right of removal by the Federal Court under the provisions of Section 29 of the Federal Judicial Code.

Complainant, however, expressly reserves to itself all benefit and advantage of so much of said order and decree of October 9, 1915, as restrains and enjoins the said defendants Sullivan & Sullivan from collecting more than their proportionate share of the said sum of \$13,614.00 on said judgment and the penalty of said bond and restrains the defendant George F. Steele, Insurance Commissioner of the State of Idaho, and his deputies and assistants, successor or successors in office, and all persons acting for him, from cancelling, revoking, annulling, or in any wise impairing the certificate, right, or authority of the complainant to do business in the State of Idaho as a Surety Company, or otherwise, because of its failure to pay the said judgment, and of the said order and decree of October 14, 1915, insofar as

it enjoins the defendants therein named from collecting or enforcing the said judgment and penalty for more than their proportionate share of the sum of \$13,614.00.

Wherefore, complainant prays that the said orders and decrees be reversed, insofar as they deny the said injunction preliminary to final hearing, as prayed for in the said complaint, and that the District Court be directed to grant said injunction as prayed for in said complaint, preliminary to final hearing.

RICHARDS & HAGA,
McKEEN F. MORROW,
Solicitors for Complainant,
Residence: Boise, Idaho.

Service of the foregoing Assignment of Errors and receipt of copy thereof, admitted this 28th day of October, 1915.

SULLIVAN & SULLIVAN,
Solicitors for Defendants Clara Mills and Others.
EDWIN SNOW,
J. G. HEDRICK,
Solicitors for William Leonard, L. A. Dithmer and Others.

J. H. PETERSON,
Attorney General,
By HERBERT WING,
Assistant,
Solicitors for Defendant George F. Steele, Insurance Commissioner.

Endorsed: Filed Oct. 28th, 1915. W. D. McReynolds, Clerk.

IN EQUITY—NO. 529.

(Title of Court and Cause.)

PETITION FOR APPEAL.

The above-named complainant, conceiving itself aggrieved by those two certain interlocutory orders and decrees made and entered in the above entitled cause on the 9th and 14th days of October, 1915, respectively, pursuant to the decision rendered in said cause on the 2nd day of September, 1915, which orders enjoined and restrained each of the defendants named therein from taking any action whatsoever to collect more of the penalty of that certain bond, given by William G. Cruse, as principal, and the said complainant, as surety, to the State of Idaho, dated the 15th day of March, 1909, than their proportionate share of \$13,614.00, and from enforcing the collection of that certain judgment, recovered in the District Court of the Fourth Judicial District of the State of Idaho, in and for Blaine County, on or about May 19, 1913, for more than \$13,614.00, and refused to enjoin or restrain said defendants, preliminary to final hearing herein, from collecting the said sum of \$13,614.00 and enforcing the said judgment for that amount, and which order of October 14, 1915, dissolved that certain other order entered herein on the 9th day of October, 1915, restraining the defendants Clara Mills, and others, from enforcing said judgment until the further order of the Court, does hereby appeal from said orders and decrees, made and entered on the 9th and 14th days of October, 1915, respectively, and each of them, to the United States Cir-

cuit Court of Appeals for the Ninth Circuit, except from so much of said orders, or either of them, as restrains the defendants therein named, other than George F. Steele, Insurance Commissioner of the State of Idaho, from enforcing the said judgment or taking any action whatsoever for the collection of more of the penalty of that certain bond, above described, than their proportionate share of the sum of \$13,614.00, and as restrains the said defendant George F. Steele, Insurance Commissioner, his deputies, assistants, successor or successors in office, and all persons acting for him, from cancelling, revoking, annulling or in any wise impairing the certificate, right, or authority of complainant to do business in the State of Idaho as a Surety Company because of the failure of the said complainant to pay said judgment.

And complainant prays that this appeal may be allowed and that citation issue, as provided by law, and that a transcript of the records, proceedings, and papers on which said orders and decrees were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And this complainant desiring to stay the enforcement of the said judgment, above described, for the collection of the sum of \$13,614.00 pending the decision of this appeal, and to preserve the subject matter of this litigation, pending such appeal, tenders bond in such amount as the Court may require for such purpose, and prays that with the allowance of this appeal the said defendants named in said orders

of October 9th and 14th, 1915, and each of them, and any and all persons acting for or in their behalf, may be restrained and enjoined from enforcing any portion of said judgment whatsoever or collecting any portion of the penalty of said bond, or proceeding further with the sale of those certain funding bonds of the District of Columbia of the par value of \$25,000.00 deposited by your petitioner with the State Treasurer of the State of Idaho, under that certain Writ of Execution issued out of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Blaine, on the 14th day of October, 1915, to the Sheriff of the County of Ada, State of Idaho, pending the determination of this appeal.

The application for such injunction is based on the records and files in this action and on the affidavit of J. H. Richards, with exhibits thereto attached, filed herewith, hereby referred to and made a part hereof.

RICHARDS & HAGA,
MCKEEN F. MORROW,
Solicitors for Complainant,
Residence: Boise, Idaho.

ORDER ALLOWING APPEAL AND RESTRAINING DEFENDANTS PENDING APPEAL.

And now, to-wit: On the 30th day of October, 1915, *It Is Ordered*, that the foregoing petition for appeal be granted and that said appeal be allowed as prayed for, and that complainant American

Surety Company of New York file a bond on appeal in the sum of Five Hundred Dollars (\$500.00) with good and sufficient security to be approved by the Court.

And the matter of restraining and enjoining the defendants hereinafter named, as prayed for in the said petition, having come on regularly to be heard at Chambers on the 29th day of October, 1915, on the record and files in this action, including the Assignment of Errors and the Petition for Appeal herein, and the affidavit of J. H. Richards and the counter-affidavit of W. E. Sullivan, Messrs. Richards & Haga and McKeen F. Morrow appearing for the said complainant and petitioner and Messrs. Sullivan & Sullivan appearing for the said defendants hereinafter named, and the Court being fully advised in the premises;

Now, Therefore, It Is Hereby Ordered, that you, the said defendants Clara Mills, W. P. Eastwood, A. J. Sullivan, Ceth D. Peacock, John C. Baugh, T. J. Reed, Joseph W. Fuld, Andrew McMonigle, Mrs. P. Donohue, Mrs. M. M. Tipton, Frank McDaniels, Russel B. Westman, Fred H. Povey, Louie Joe, Ching Bing, Harris Furniture Co., Mrs. C. E. Harris, Jim Riggi, E. R. Richards, Hailey Hose Co., Charles Cuneo, Frank Morris, Hailey Butcher Co., L. J. McConnell, Julia Haupt, John Mizer, John Seymour, Mrs. T. Povey, W. J. Oliver, Pelky & Co., John Pugel, Enrique E. Joywecheo, Margaret Sutherland, Ellen Walker, H. Whitmore, Augustus Anacabee, Vincente Guisasola, Maggie J. Porter, F. R. Gooding, assignee

of Richard Jones and E. H. Baker, Charles Cuneo, assignee of Fidela Rsteinsia, Leo Bott, Thomas Johnson, Louis D. Paoli and Giulio Pallinio, Peter Snider, assignee of G. Guigliani, Mark Faladora, C. Juliean and Joe Fereta, F. W. Nitschke, Treasurer of F. O. E. Lodge, Sullivan & Sullivan, assignee of I. N. Sullivan, J. J. McFadden, Administrator, with will annexed, of the estate of Frank E. Foote, deceased, McFadden & Brodhead, Trustees, M. E. Mallory, Treasurer of Hailey Baseball Club, and E. Daft, Receiver of Idaho State Bank, assignee of J. S. Whitton, your agents, servants and attorneys, and all persons acting by or under your authority or direction, be, and you are hereby restrained and enjoined from collecting, enforcing the collection, or taking any action whatsoever for the collection, of that certain judgment recovered for your use and benefit in the District Court of the Fourth Judicial District of the State of Idaho, in and for Blaine County, on or about the 19th day of May, 1913, or proceeding further with the sale of those certain bonds of the District of Columbia of the par value of \$25,000.00 deposited by complainant, American Surety Company of New York, with the State Treasurer of the State of Idaho, under that certain Writ of Execution issued out of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Blaine, on the 14th day of October, 1915, to the Sheriff of the County of Ada, State of Idaho, pending the determination of this appeal, upon the petitioner filing a bond to the above-named defendants in a form to be

approved by the Court, in the sum of Fifteen Thousand Dollars (\$15,000.00), with good and sufficient sureties, conditioned that the above-named complainant and petitioner will prosecute its said appeal to effect and answer all damages and costs, if it shall fail to sustain its appeal, and in that event will pay the further sum of fifty dollars (\$50.00) as an attorney's fee, and will pay to the said defendants when the decision of the Circuit Court of Appeals herein shall have become final the sum of \$13,614.00, with interest thereon at the rate of twelve per cent (12%) per annum from the 9th day of December, 1915, in the event that the said interlocutory orders and decrees appealed from herein are affirmed in their entirety; and in the event that said Circuit Court of Appeals holds that the lower court erred in not deducting the amount of the dividends received, to-wit, \$3,420.75 from the said \$13,614.00, then said complainant will pay to said Mills, et al., the sum of \$10,193.25, less dividends if any hereafter received by said defendants, with interest at the rate of twelve per cent. (12%) from December 9th, 1915. But that in the event that said orders and decrees are reversed in their entirety, or in the event that, prior to the time that the decision of the said Circuit Court of Appeals herein becomes final, the Supreme Court of the United States in the cause now pending there on Writ of Error, in which complainant herein is plaintiff in error and the State of Idaho, to and for the use and benefit of Clara Mills, et al., is defendant in error, shall have held said judgment, the enforcement

of which is sought to be enjoined in this action, invalid, said bond shall be null and void.

Dated October 30th, 1915.

(Signed) FRANK S. DIETRICH,

District Judge.

Endorsed: Filed October 30, 1915. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

AFFIDAVIT IN SUPPORT OF PETITION FOR
INJUNCTION PENDING APPEAL.

United States of America,
State of Idaho,
County of Ada,—ss.

J. H. Richards, being first duly sworn, deposes and says: That he is one of the attorneys for the above-named complainant, American Surety Company of New York, in the above-entitled cause, and in that certain action in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Blaine, in which the State of Idaho, to and for the use and benefit of Clara Mills and others, recovered judgment against the said American Surety Company of New York for the sum of \$22,624.33, and interest and costs, the enforcement of which said judgment the above-named complainant sought to have enjoined herein;

That on the 9th and 14th days of October, 1915, respectively, this Court made and entered two certain interlocutory orders or decrees enjoining the

said Clara Mills and others from collecting more on the said judgment than their proportionate share of \$13,614.00, and refusing to enjoin the said defendants from collecting or enforcing the collection of their proportionate share of \$13,614.00 on the said judgment; and the said complainant, American Surety Company of New York, is perfecting an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the said interlocutory orders or decrees of October 9th and October 14th, 1915, insofar as they deny and refuse the temporary injunction as prayed for in the bill of complaint herein, restraining the said defendants named in such orders from collecting or enforcing the collection of their proportionate share of \$13,614.00 on said judgment; and such appeal is taken in good faith and for the purpose of determining the right of the said defendants to enforce the collection of any part of said judgment pending the final determination of this action, and the right of said defendants to enforce the collection of said judgment for the sum of \$13,614.00, without accounting for the dividends to the amount of several thousand dollars received by them since the entry of said judgment from the Receiver of the Idaho State Bank at Hailey, Idaho, on the identical claims on which said judgment was recovered against the said American Surety Company of New York, complainant herein;

That on the 14th day of October, 1915, the said defendants Clara Mills and others, through their attorneys Messrs. Sullivan & Sullivan, who are also

defendants herein, caused a Writ of Execution to issue from the said District Court of the Fourth Judicial District of the State of Idaho, in and for Blaine County, to the Sheriff of the County of Ada, State of Idaho, directing said Sheriff to satisfy said judgment in the amount of \$13,614.00 out of any money, bonds, or other securities deposited by the said American Surety Company of New York with the State Treasurer of the State of Idaho, in trust, to answer defaults of said Company as surety in conformity with the provisions of the statutes of Idaho, and particularly Session Laws, 1911, Chapter 228, Section 89, page 771, all of which more fully appears from said Writ of Execution, a copy of which is attached hereto, marked Exhibit "A," made a part hereof, and hereby referred to;

That on the 15th day of October, 1915, the said Sheriff of Ada County, one Emmitt Pfof, gave notice to the said American Surety Company of New York, complainant herein, to Richards & Haga, its attorneys, to Sheppard & Falk, agents of said Company in Boise, to John W. Eagleson, State Treasurer of the State of Idaho, and to George F. Steele, Insurance Commissioner of the State of Idaho, that he would on the 9th day of December, 1915, at 10 o'clock A. M., in front of the Court House at Boise, Idaho, sell at public auction to the highest bidder, for cash, to satisfy said execution and a proportionate part of the said judgment, all the right, title, and interest of the said American Surety Company of New York, complainant herein, in five certain funding bonds of

the District of Columbia, therein specified, of the par value of \$25,000.00, a copy of which said notice is attached hereto, marked Exhibit "B," made a part hereof, and hereby referred to; that a copy of said notice with a copy of said Writ of Execution thereto attached was served upon this affiant, as one of the attorneys for said American Surety Company of New York, and upon Messrs. Sheppard & Falk, as agents of said Company, upon the 16th day of October, 1915; and affiant is informed and believes that copies of said papers were also served on the said George F. Steele, Insurance Commissioner of the State of Idaho, and upon John W. Eagleson, State Treasurer of the State of Idaho, on the same day;

That the value of said bonds is greatly in excess of \$13,614.00, and unless said sale is enjoined and restrained the said Clara Mills and others, defendants herein, holders of said judgment, will proceed to the sale of said bonds, and by said sale will enforce the collection of the full sum of \$13,614.00 before the appeal taken herein by complainant can be determined, without accounting for dividends to the amount of several thousand dollars received by them from the Receiver of the Idaho State Bank at Hailey, since the entry of said judgment on account of the identical claims on which they recovered said judgment, all to the great and irreparable injury of complainant herein, and said complainant will be effectually deprived of its right to appeal from said interlocutory orders and decrees by the destruction of the subject matter of the litigation, and by the carrying

out of the acts sought to be enjoined by the bill of complaint herein, and will be left wholly without remedy in the premises.

Further this affiant saith not.

J. H. RICHARDS.

Subscribed and sworn to before me this 28th day of October, 1915.

(Notary Seal(

EDNA L. HICE,
Notary Public for Idaho,
Residing at Boise, Idaho.

Endorsed: Filed October 28, 1915. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

AFFIDAVIT IN OPPOSITION TO GRANTING
INJUNCTION PENDING APPEAL.

State of Idaho,
County of Ada,—ss.

W. E. Sullivan, being first duly sworn, deposes and says: That he is one of the attorneys for certain of the above named defendants generally referred to in the proceedings herein as Mills, et al., and in that certain action in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Blaine, wherein the State of Idaho, to and for the use and benefit of Clara Mills et al., was plaintiff, and the American Surety Company of New York, was defendant;

That in answering the statements in the affidavit in support of the petition for injunction pending the appeal herein that dividends to the amount of several

thousand dollars had been received by said Mills et al., since the entry of said judgment and had not been accounted for, this affiant states: That the Receiver of the Idaho State Bank paid the following dividends to all of the depositors of said Bank, including Mills et al., Dithmer et al., and William Leonard, to-wit:

On May 25, 1913.....	10%
On December 19, 1913.....	5%
On September 24, 1914.....	3%
Total	<u>18%</u>

That on the 14th day of October, 1915, a partial satisfaction of said judgment was duly made and endorsed on the margin of the Judgment Docket of said District Court of Blaine County for the above dividends of 18%, amounting to \$3,420.75; that said dividends are the only payments that have been made upon said judgment, and the only dividends that have been paid up to the date hereof by said Receiver.

W. E. SULLIVAN.

Subscribed and sworn to before me this 29th day of October, 1915.

(Seal)

LAUREL E. ELAM,
Notary Public,
Residence: Boise, Idaho.

My commission expires June 12, 1918.

Service of copy of foregoing Affidavit admitted this 29th day of October, 1915.

RICHARDS & HAGA,
Attorneys for Plaintiff.

Endorsed: Filed October 29th, 1915. W. D. McReynolds, Clark.

(Title of Court and Cause.)

BOND ON RESTRAINING ORDER PENDING
APPEAL.

Know All Men by These Presents, that we, American Surety Company of New York, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto the following defendants in the above-entitled cause, to-wit: Clara Mills, W. P. Eastwood, A. J. Sullivan, Ceth D. Peacock, John C. Baugh, T. J. Reed, Joseph W. Fuld, Andrew McMonigle, Mrs. P. Donohue, Mrs. M. M. Tipton, Frank McDaniels, Russel B. Westman, Fred H. Povey, Louie Joe, Ching Bing, Harris Furniture Co., Mrs. C. E. Harris, Jim Riggi, E. R. Richards, Hailey Hose Co., Charles Cuneo, Frank Morris, Hailey Butcher Co., L. J. McConnell, Julia Haupt, John Mizer, John Seymour, Mrs. T. Povey, W. J. Oliver, Pelky & Co., John Pugel, Enrique E. Joywecheo, Margaret Sutherland, Ellen Walker, H. Whitmore, Augustus Anacabee, Vincente Guisasola, Maggie J. Porter, F. R. Gooding, assignee of Richard Jones, and E. H. Baker, Charles Cuneo, assignee of Fidela Rsteinsia, Leo Bott, Thomas Johnson, Louis D. Paoli and Giulio Pallinio, Peter Snider, assignee of G. Guigliani, Mark Faladora, C. Juliean and Joe Fereta, F. W. Nitschke, Treasurer of F. O. E. Lodge, Sullivan & Sullivan, assignee of I. N. Sullivan, J. J. McFadden, administrator, with will annexed, of the estate of Frank E. Foote, deceased, McFadden & Brodhead, Trustees, M. E. Mallory, Treasurer of Hailey Baseball Club, and E. Daft, Receiver of Idaho

State Bank, and assignee of J. S. Whitton, in the sum of Fifteen Thousand Dollars (\$15,000.00), for the payment of which, well and truly to be made, we bind ourselves and each of us, and all and each of our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 17th day of November, in the year of our Lord, one thousand nine hundred and fifteen.

The condition of this obligation is such, that,

Whereas, The said American Surety Company of New York, the above-named complainant, has prosecuted an appeal to the United States Circuit Court of Appeals from two certain interlocutory orders or decrees entered in the above-entitled cause and Court, on the 9th and 14th days of October, 1915, respectively; and,

Whereas, The said Court at the time said appeal was allowed, to-wit, on the 30th day of October, 1915, on application of said complainant and after hearing, in order to preserve the status quo of the parties and the subject matter of the litigation pending such appeal, entered an order restraining and enjoining the defendants named in the first paragraph hereof from collecting, enforcing the collection or taking any action whatsoever for the collection of a certain judgment recovered by said defendants, or for their use and benefit, in the District Court of the Fourth Judicial District for the State of Idaho, in and for Blaine County, on or about the 19th day of May, 1913, or proceeding further under a certain writ of

execution issued on said judgment to the Sheriff of Ada County, State of Idaho, upon condition that the above-named complainant and appellant should cause to be executed and filed a good and sufficient bond to said defendants, for the sum of \$15,000.00;

Now, Therefore, if the above-named complainant and appellant, American Surety Company of New York, shall prosecute its said appeal to effect and answer all damages and costs, if it shall fail to sustain its appeal, or if it shall be held that said order was improperly granted, and in that event shall pay the further sum of Fifty Dollars (\$50.00) as an attorney's fee, and shall pay to the said defendants when the decision of the Circuit Court of Appeals herein shall have become final the sum of \$13,614.00, with interest thereon at the rate of twelve per cent. (12%) per annum from the 9th day of December, 1915, in the event that the said interlocutory orders and decrees appealed from herein are affirmed in their entirety; and in the event that said Circuit Court of Appeals holds that the lower court erred in not deducting the amount of the dividends received, to-wit, \$3,420.75 from the said \$13,614.00, then said complainant will pay to said Mills et al., the sum of \$10,-193.25, less dividends if any hereafter received by said defendants, with interest at the rate of twelve per cent. (12%) per annum from December 9, 1915. But that in the event that said orders and decrees are reversed in their entirety, or in the event that, prior to the time that the decision of the said Circuit Court of Appeals herein becomes final, the Supreme

Court of the United States in the cause now pending there on Writ of Error, in which complainant herein is plaintiff in error and the State of Idaho, to and for the use and benefit of Clara Mills et al., is defendant in error, shall have held said judgment, the enforcement of which is sought to be enjoined in this action, invalid, then this obligation shall be void, otherwise to remain in full force and effect; provided, however, that the liability of the said complainant and appellant and the said Fidelity and Deposit Company of Maryland on this bond shall in no event exceed the said sum of \$15,000.00.

AMERICAN SURETY COMPANY
OF NEW YORK,

(Corporate Seal)

By Bradley Sheppard,
Resident Vice President.

Attest: McKeen F. Morrow, Resident Assistant
Secretary.

FIDELITY AND DEPOSIT COM-
PANY OF MARYLAND,

(Corporate Seal)

By Sidney C. Fuld,
Its Attorney in Fact.

Attest: Walter S. Bruce, General Agent.

The above bond is hereby approved both as to form and sufficiency of the sureties, and it is further ordered that on the filing of said bond in the District Court of the United States for the District of Idaho, Southern Division, counsel for complainant shall serve notice on the defendants named in said bond, and thereupon the order enjoining and restraining

said defendants herein made on the 30th day of October, 1915, shall be in full force and effect.

Dated this 20th day of November, 1915.

(Signed) FRANK S. DIETRICH,

Judge.

Endorsed: Filed Nov. 20, 1915. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

NOTICE.

To Clara Mills, and others, defendants in the above-entitled cause, and to Messrs. Sullivan & Sullivan, their attorneys of record:

You and Each of You Are Hereby Notified, that the bond in the sum of Fifteen Thousand Dollars (\$15,000.00) in your favor, required by that certain order of the above-entitled Court entered in said cause on or about the 30th day of October, 1915, was filed with the Clerk of said Court on the 20th day of November, 1915, together with an order of said Court approving the sufficiency of the same, both as to form and as to sureties and directing the service of notice of such filing upon you.

RICHARDS & HAGA,

McKEEN F. MORROW,

Solicitors for Complainant.

Service of the above notice and receipt of copy thereof admitted this 24th day of November, 1915.

SULLIVAN & SULLIVAN,

Solicitors for Defendants Clara Mills et al.

Endorsed: Filed Nov. 24th, 1915. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

BOND ON APPEAL.

Know All Men by These Presents, that we, American Surety Company of New York, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto the defendants named in the above-entitled cause in the just and full sum of Five Hundred Dollars (\$500.00), for the payment of which, well and truly to be made, we bind ourselves, and each of us, and our, and each of our, successors and assigns, firmly by these presents.

Sealed with our seals and dated this 30th day of October, 1915.

The condition of this obligation is such, that,

Whereas, the above-named American Surety Company of New York, complainant, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from those two certain interlocutory orders or decrees entered in the above entitled cause in the District Court of the United States for the District of Idaho, Southern Division, on the 9th and 14th days of October, 1915, respectively;

Now, Therefore, if the above-named complainant, American Surety Company of New York, shall prosecute its said appeal to effect, and answer all costs, if it shall fail to sustain its said appeal, then the above obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

In Witness Whereof, the said principal and surety have caused their names to be hereunto subscribed

by their duly authorized officers or attorneys in fact, and their corporate seals affixed, the day and year first above written.

AMERICAN SURETY COMPANY
OF NEW YORK,

(Corporate Seal) By Bradley Sheppard,
Resident Vice President.

Attest: McKeen F. Morrow, Resident Assistant
Secretary.

FIDELITY AND DEPOSIT COM-
PANY OF MARYLAND,

(Corporate Seal) By Sidney C. Fuld,
Its Attorney in Fact.

Attest: Walter S. Bruce, General Agent.

Approved. (Signed) FRANK S. DIETRICH.

Endorsed: Filed October 30, 1915. W. D. Mc-
Reynolds, Clerk.

CITATION.

United States of America,—ss.

To Clara Mills, W. P. Eastwood, A. J. Sullivan, Ceth D. Peacock, John C. Baugh, T. J. Reed, Joseph W. Fuld, Andrew McMonigle, Mrs. P. Donohue, Mrs. M. M. Tipton, Frank McDaniels, Russel B. Westman, Fred H. Povey, Louie Joe, Ching Bing, Harris Furniture Co., Mrs. C. E. Harris, Jim Riggi, E. R. Richards, Hailey Hose Co., Charles Cuneo, Frank Morris, Hailey Butcher Co., L. J. McConnell, Julia Haupt, John Mizer, John Seymour, Mrs. T. Povey, W. J. Oliver, Pelky & Co., John Pugel, Enrique E. Joywecheo, Margaret Sutherland, Ellen Walker, H.

Whitmore, Augustus Anacabee, Vincente Guisasola, Maggie J. Porter, F. R. Gooding, assignee of Richard Jones and E. H. Baker, Charles Cuneo, assignee of Fidela Rsteinsia, Leo Bott, Thomas Johnson, Louis D. Paoli, and Guilio Pallinio, Peter Snider, assignee of G. Guigliani, Mark Faladora, C. Juliean and Joe Fereta, F. W. Nitschke, Treasurer of F. O. E. Lodge, Sullivan & Sullivan, assignee of I. N. Sullivan, J. J. McFadden, administrator, with will annexed, of the estate of Frank E. Foote, deceased, McFadden & Brodhead, Trustees, M. E. Mallory, Treasurer of Hailey Baseball Club, E. Daft, Receiver of Idaho State Bank, assignee of J. S. Whitton, William Leonard, L. A. Dithmer, J. M. McPherson, Robert Franklin, J. F. McCoy, E. W. Kleinman, Friedman Company, Ltd., a corporation, Lucile Friedman, S. J. Benson, Aukema Drug Company, M. J. Daly, Bellevue State Bank, a corporation, assignee of Jos. Werry, Harry J. Allen, Mrs. W. J. Lamme, W. J. Lamme, Annie I. Harris (formerly Annie I. Miller), and George F. Steele, Insurance Commissioner of the State of Idaho:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, to be held in the City of San Francisco in the State of California, within thirty (30) days from the date of this Writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Idaho, Southern Division, wherein American Surety

Company of New York is complainant, and you, and each of you, are defendants, to show cause, if any there be, why the orders and decrees in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness The Honorable Frank S. Dietrich, United States District Judge for the District of Idaho, this 30th day of October, A. D. 1915, and of the Independence of the United States the one hundred and fortieth year.

FRANK S. DIETRICH,

(Seal)

District Judge.

W. D. McREYNOLDS, Clerk.

Service of the foregoing Citation and receipt of a copy thereof admitted this 1st day of November, 1915.

SULLIVAN & SULLIVAN,

Solicitors for Defendants Clara Mills, W. P. Eastwood, A. J. Sullivan, Ceth D. Peacock, John C. Baugh, T. J. Reed, Joseph W. Fuld, Andrew McMonigle, Mrs. P. Donohue, Mrs. M. M. Tipton, Frank McDaniels, Russel B. Westman, Fred H. Povey, Louie Joe, Ching Bing, Harris Furniture Co., Mrs. C. E. Harris, Jim Riggi, E. R. Richards, Hailey Hose Co., Charles Cuneo, Frank Morris, Hailey Butcher Co., L. J. McConnell, Julia Haupt, John Mizer, John Seymour, Mrs. T. Povey, W. J. Oliver, Pelky & Co., John Pugel, Enrique E. Joywecheo, Margaret Sutherland, Ellen Walker, H. Whitmore, Augustus Anacabee, Vincente Guisasa, Maggie J. Porter, F. R. Gooding, assignee of

Richard Jones and E. H. Baker, Charles Cuneo, assignee of Fidela Rsteinsia Leo Bott, Thomas Johnson, Louis D. Paoli and Giulio Pallinio, Peter Snider, assignee of G. Guigliani, Mark Faladora, C. Juliaen and Joe Fereta, F. W. Nitschke, Treasurer of F. O. E. Lodge, Sullivan & Sullivan, assignee of I. N. Sullivan, J. J. McFadden, administrator, with will annexed, of the estate of Frank E. Foote, deceased, McFadden & Brodhead, Trustees, M. E. Mallory, Treasurer of Hailey Baseball Club, and E. Daft, Receiver of Idaho State Bank, assignee of J. S. Whitton.

EDWIN SNOW,

J. G. HEDRICK,

Solicitors for William Leonard, L. A. Dithmer, J. M. McPherson, Robert Franklin, J. F. McCoy, E. W. Kleinman, Friedman Company, Ltd., a corporation, Lucile Friedman, S. J. Benson, Aukema Drug Company, M. J. Daly, Bellevue State Bank, a corporation, assignee of Jos. Werry, Harry J. Allen, Mrs. W. J. Lamme, W. J. Lamme, Annie I. Harris (formerly Annie I. Miller).

J. H. PETERSON,

Attorney General,

By HERBERT WING,

Assistant,

Solicitors for Defendant, George F. Steele, Insurance Commissioner of the State of Idaho.

Endorsed: Filed Nov. 1, 1915. W. D. McReynolds, Clerk.

RETURN TO RECORD.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and the same is transmitted accordingly.

Attest:

W. D. McREYNOLDS,

(Seal)

Clerk.

AMERICAN SURETY COMPANY OF NEW
YORK, a Corporation,

Appellant,

VS.

CLARA MILLS, GEORGE F. STEELE, Insurance
Commissioner of the State of Idaho, et al.,

Appellees.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the above and foregoing transcript of pages from 1 to 106 inclusive contain true and correct copies of the Bill of Complaint, Bill of Complaint in Leonard vs. Mills et al., Equity No. 530; Motion for Preliminary Injunction, Motion to Dismiss by Defendants Sullivan & Sullivan, Motion to Dismiss by Defendant George F. Steele, Motion to Dismiss by Defendants Clara Mills et al., Opinion of the Court, Order Enjoining Defendants Sullivan & Sullivan and Geo. F. Steele, filed Oct. 9, 1915; Order Enjoining Defendants Clara Mills et al., filed

Oct. 14, 1915; Bond on Preliminary Injunction, Order Denying Motion to Dismiss, Assignment of Errors, Petition for Appeal, Order Allowing Appeal and Restraining Defendants Pending Appeal, Affidavit of J. H. Richards in Support of Application for Injunction Pending Appeal, Affidavit of W. E. Sullivan in Opposition to Such Application, Bond on Restraining Order Pending Appeal, and Order Approving Same, Notice of filing such Bond, Bond on Appeal, Citation, omitting therefrom the title except in the Bill of Complaint and in the Bill of Complaint of William Leonard in Cause No. 530, inserting in lieu of such title the words "Title of Court and Cause" and omitting the verification of pleadings, inserting in lieu thereof the words "Duly Verified," which together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the costs of the record herein amount to the sum of \$125.20 and that the same has been paid by the Appellant.

Witness my hand and the seal of said Court affixed at Boise, Idaho, this third day of December, A. D. 1915.

(Seal)

W. D. McREYNOLDS,

Clerk.

No. 2699.

United States
Circuit Court of Appeals
For the Ninth Circuit

AMERICAN SURETY COMPANY OF NEW
YORK, a Corporation, Appellant,
VS.

CLARA MILLS, GEORGE F. STEELE, Insurance
Commissioner of the State of Idaho, et al.,
Appellees.

Brief of Appellant

*Upon Appeal from the United States District Court
for the District of Idaho, Southern Division.*

RICHARDS & HAGA and
McKEEN F. MORROW,
Solicitors for Appellant,
Residence: Boise, Idaho.

United States
Circuit Court of Appeals
For the Ninth Circuit

AMERICAN SURETY COMPANY OF NEW
YORK, a Corporation, Appellant,

VS.

CLARA MILLS, GEORGE F. STEELE, Insurance
Commissioner of the State of Idaho, et al.,
Appellees.

Brief of Appellant

*Upon Appeal from the United States District Court
for the District of Idaho, Southern Division.*

RICHARDS & HAGA and
McKEEN F. MORROW,
Solicitors for Appellant,
Residence: Boise, Idaho.

United States
Circuit Court of Appeals
For the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW
YORK, a Corporation, Appellant,
VS.
CLARA MILLS, GEORGE F. STEELE, Insurance
Commissioner of the State of Idaho, et al.,
Appellees.

BRIEF OF APPELLANT

*Upon Appeal from the United States District Court
for the District of Idaho, Southern Division.*

STATEMENT OF THE CASE.

This is an appeal from an order denying, in part, a temporary injunction.

The suit was commenced by appellant May 6, 1915, primarily for the purpose of enjoining the appellees, Clara Mills and her associates, from collecting under a certain judgment obtained against appellant in the State Court, more than their pro rata part of the penalty of a certain fidelity bond under which a large number of claimants were making claims against appellant, the aggregate of such claims being over \$90,000.00, whereas, the penalty of the bond was

only \$50,000.00. Appellant also sought to restrain the Insurance Commissioner of the State of Idaho from taking any action to annul appellant's license or right to do business in the State of Idaho because of its refusal to pay Clara Mills and her associates the full amount of their said claims, to-wit: \$22,624.33, with interest.

Appellant further sought a determination of the amount due the respective claimants, and the pro rata part of the penalty of the bond which each claimant was entitled to receive, to the end that appellant might with safety pay the claims so made against it without rendering itself liable to other claimants for having paid any claimant more than the pro rata part of his just claim.

Appellant also sought to compel appellees to account for certain dividends received and which should have been credited upon their said claims and judgment, the amount of which dividend was unknown to appellant.

The Court granted a temporary injunction against the Insurance Commissioner, but left Clara Mills and her associates free to collect a certain proportionate part of their claims. Without, however, having in any way determined the amount due the several claimants, or the aggregate of the valid claims under said bond, or the amount due Clara Mills and her associates, and without requiring them to account for dividends received and for which no credit had been allowed appellant.

Under the order made by the Court appellant was compelled to pay forthwith to Clara Mills and her associates, \$13,614.00, or suffer its securities, deposited with the State of Idaho, to be sold in satisfaction of said claims. Such order was made without first determining the validity of the claims so ordered paid, and without first determining the just proportion of the penalty of the bond to which said claimants would be entitled, and it places appellant in the position that it may later be required to pay to other claimants the full penalty of the bond in addition to the sum aforesaid.

The matter was heard below on the verified Bill of Complaint in this cause (Tr., pp. 7-33), and the verified Bill of Complaint in the cause pending in said Court, wherein William Leonard was plaintiff, and this appellant and the said appellees, except George H. Steele, were defendants, being Equity Cause No. 530 (Tr., pp. 636-652), and on the motion to dismiss filed by Clara Mills and her associates. The facts are, therefore, not in dispute. The admitted facts as set forth in the two verified Bills of Complaint above referred to, briefly stated, are in substance as follows:

On the 6th day of March, 1909, one William G. Cruse was appointed Bank Commissioner of the State of Idaho. And on the 15th day of March, 1909, said Cruse as principal, and the appellant, American Surety Company of New York, as surety, executed to the State of Idaho a certain bond in the penal sum of \$50,000.00, to the effect that said Cruse would

“well, faithfully and impartially discharge the duties of his office, and pay over to the person entitled by law to receive it, all money coming into his hands by virtue of his office, etc.” (Tr., p. 33.) Thereafter, and on or about the 31st day of August, 1910, the Idaho State Bank at Hailey, Idaho, closed its doors and suspended payment. And thereafter, and on the 31st day of August, 1912, Clara Mills and her associates, the names of whom are set forth in paragraph IX of appellant’s Bill (Tr., p. 12), commenced an action in the State Court of Blaine County, Idaho, against appellant for approximately \$22,000.00, such action being based on the alleged claim that plaintiffs were entitled to recover from the surety on the Bank Commissioner’s bond the amount of money which they had on deposit in the said bank at the time it closed its doors and suspended payment. Process in said action was served upon this appellant, defendant there, and its time for appearance expired on October 14, 1912. But on October 7, 1912, appellant served upon counsel for plaintiffs in said suit, a written notice and petition and bond for removal of said cause from the State Court to the Federal Court, and said notice, petition and bond were filed with the Clerk of the Court in which said action was pending, on the 8th day of October, 1912, and in less than thirty days thereafter, to-wit, on October 28th, 1912, appellant filed with the Clerk of the United States District Court for said district a duly certified copy of the record in said action, all in full compliance with the provisions of Section 29 of the Judicial Code.

That pending the removal of the cause to the Federal Court, and on, to-wit, the 16th day of October, 1912, the attorneys for Clara Mills and her associates, plaintiffs in said action, prevailed upon the Clerk of the State Court in which such action had been commenced, to enter appellant's default, all without notice to or knowledge of such action by either appellant or the Court. And thereafter, to-wit, on May 19th, 1913, the said State Court entered a default judgment against appellant for \$22,624.33; said State Court, upon the objection of the attorneys for plaintiffs therein, having declined upon terms, or otherwise, to permit appellant to plead or otherwise appear and defend in said action. And the said Clara Mills and associates now seek to enforce said judgment with interest at 7% from the date the same was entered, as aforesaid. That thereafter, and on August 30th, 1913, L. A. Dithmer, William Leonard and others commenced a similar action against appellant in the same Court. The action of Leonard was transferred to the Federal Court and is now pending in said Court. Leonard, in his action, demands judgment against appellant for \$9656.93, with interest at 7% from September 1st, 1910. The said Dithmer and his associates, their names and the amount claimed by each being set out on page 16 of the transcript, have an action pending against appellant in said State Court, wherein they pray judgment against appellant for about \$56,000.00. The aggregate of the claims of Leonard and Dithmer and their associates, not including Clara Mills and those join-

ing with her in the first action, being approximately \$69,000.00, including interest, at the time of the commencement of this suit, and the aggregate of all claims, including the judgment of Clara Mills and her associates, being over \$90,000.00, or over \$40,000.00 in excess of the penalty of the bond. That notwithstanding all of said claimants are demanding judgment against appellant for the full amount they had on deposit in the bank at the time it closed its doors, and the Mills claimants have actually recovered judgment for such amount, they have, nevertheless, drawn large sums as dividends from the Receiver of said bank, which they have not credited upon their claims, but are seeking to recover from the surety the amount of their respective deposits as well as dividends thereon from the Receiver of the bank. That Leonard, Dithmer and their associates claim not to be bound by the default judgment acquired by Clara Mills and her associates against appellant, and deny the right of appellant to pay said judgment or any part thereof, and claim that in view of the fact that the claims of Dithmer, Leonard and their associates exceed the amount of the penalty of the bond, any payment made by appellant to Clara Mills and her associates operates as a direct loss to said Leonard, Dithmer and their associates, and that they will decline to recognize any such payments, and decline to be bound by the judgment obtained by said Clara Mills and her associates, for the reason that they were not parties thereto, and have not had an opportunity to contest the claims of said judgment creditors.

For these and other reasons set forth in appellant's Bill, appellant brought its suit in equity to compel all claimants to come into Court and establish their respective claims in one suit, not only as against appellant, but as against each other, to the end that appellant might be protected against having to pay more than the penalty of its bond, and each claimant receive his just proportion of the fund, in the event the aggregate of valid claims exceeded such penalty. Appellant alleged in its Bill that Clara Mills and her associates should be perpetually enjoined and restrained from enforcing the judgment obtained in the State Court, for the reason that the same was wrongfully obtained through accident and mistake, and that the enforcement thereof would be unjust, inequitable and unconscionable, and that it was void for the reason that under Section 29 of the Judicial Code the jurisdiction of the State Court terminated upon the filing of a proper petition and bond for removal, with a written notice thereof duly served upon the plaintiffs in said action, as provided by said Section 29; and that appellant was not required to plead in said action, except as provided in said Section 29, until the cause was remanded from the Federal Court.

The Court below held that appellant was entitled to protection to the end that it might not be compelled to pay more than the penalty of the bond, and held that the judgment obtained by Clara Mills and her associates was not binding upon other claimants who were not parties to that action, and that no claimant

was entitled to more than his pro rata part of the penalty of the bond, based upon the aggregate of valid claims against appellant under the bond, and that each claimant had the right to contest the claims of the others, the Court saying:

“The other claimants would have the right to be heard on all matters touching the distribution of funds in which they have an interest, and if, upon a full hearing, in a proceeding to which all claimants are parties, it turns out to be necessary, in order to avoid injustice, to restrict the apparent judgment rights of Mills and her associates, that is a consequence for which they themselves are to blame, in that they did not bring into the suit in which they obtained their judgment, all parties in interest. Now for the first time the Court is asked to assume jurisdiction of the entire fund and make complete distribution thereof, and now for the first time all claims upon this fund are brought into a single proceeding for adjudication. Not only has the State Court never had jurisdiction of the fund, but it has never had jurisdiction of or adjudicated any issue as between the several claimants.”

While the Court correctly applied the principle which governs controversies of this character, it entered an order in direct conflict with its decision; an order under which appellant may be required to pay a sum largely in excess of the penalty of the bond, for it permitted Clara Mills and her associates

to collect from appellant such proportion of the penalty of the bond as the face of the *undetermined claims* of Clara Mills and her associates bears to the aggregate of all claims, and without deducting or taking into consideration the dividends that have been paid, or that may be collected during the litigation, or thereafter. (Tr., pp. 72-75.)

The District Court also imposed most unusual and extraordinary burdens and penalties upon appellant in connection with the granting of the supersedeas pending this appeal. It not only required appellant to give a supersedeas bond in the sum of \$15,000.00, with the usual conditions, but it added the extraordinary condition that, if appellant should fail to sustain its appeal, it should pay appellees an attorney's fee of \$50.00, and interest on the said sum of \$13,614.00, at the rate of 12% *per annum* from December 9th, 1915, even though the order appealed from be substantially modified on appeal, whereas, the legal rate in Idaho is 7%. (See order allowing appeal, Tr. pp. 85-89, and Supersedeas Bond, Tr. pp. 95-98.)

ASSIGNMENT OF ERRORS.

The errors are specified in detail in the Assignment of Errors, pp. 78 to 82 of the record. Stated generally, they are:

1. That the Court erred in not enjoining and restraining until final hearing in this cause the appellees, Clara Mills and her associates, named in par-

agraph IX of the Bill (Tr., pp. 12 to 14), from collecting or enforcing the collection, or taking any steps whatsoever for collecting the penalty, or any part thereof, of that certain bond described in the Bill of Complaint herein.

2. That the Court erred in holding and deciding that the appellees, Clara Mills and her associates, named in paragraph IX of the Bill of Complaint (Tr., pp. 12 to 14), were entitled to collect \$13,614 from the appellant under the penalty of the bond described in the Bill of Complaint, without first having determined the validity or correctness of the claims of said appellees, either as against appellant or other claimants under said bond, or without first determining the amount of the claims entitled to be paid out of the penalty of said bond and the proportion of such penalty to which each claimant may be entitled.

3. That the Court erred in holding and deciding that the said appellees could collect from appellant their proportionate share, based upon the face of their alleged claims, of the penalty of said bond, without accounting for the dividends collected and received by them on account of said claims, and which had not been credited thereon, and without making any provision for the crediting of future dividends.

4. That the Court erred in refusing to enjoin or restrain the said appellees from enforcing the judgment obtained by them against appellant in the District Court of the Fourth Judicial District of the

State of Idaho, in and for the County of Blaine, on May 19, 1913, and referred to in the Bill herein, under the allegations of the Bill that such judgment was taken by default after plaintiff had appeared by serving upon counsel for appellees written notice of the petition and bond for removal, and filed such notice, petition and bond for removal within the time and in the manner required by Sec. 29 of the Judicial Code, and pending the determination of the right of removal by the Federal Court.

5. That the Court erred in not holding that the default taken by the said appellees in the State Court was premature, and in not holding that the judgment entered thereon was void, and that the State Court had no jurisdiction pending the determination by the Federal Court of the right of removal.

6. That the Court erred in declining and refusing for any reason to enjoin or restrain the said appellees until final hearing from enforcing the collection of the judgment obtained by said appellees against appellant in the District Court of the Fourth Judicial District of the State of Idaho, in and for Blaine County, on May 19, 1913.

7. That the Court imposed unreasonable and illegal burdens and penalties upon appellant as a condition for a supersedeas and stay of proceedings pending the determination of this appeal.

For a more particular statement of the errors assigned and relied upon on appeal, reference is made to the assignment of errors contained in the record. (Tr., pp. 78-82.)

POINTS AND AUTHORITIES.

Where the penalty of a bond is less than the aggregate of the claims made against the surety thereunder, the equitable rule of pro rata distribution should be applied.

Illinois Surety Co. v. U. S. (C. C. A., 7th Circuit), 226 Fed. 665.

American Surety Co. v. Lawrenceville Cement Co., 96 Fed. 25.

United States v. American Surety Co., 126 Fed. 811.

United States v. American Surety Co., 67 C. C. A., 552, 135 Fed. 78.

United States v. Heaton, 63 C. C. A. 156, 128 Fed. 414.

Guffanti v. National Surety Co., 133 App. Div. 610, 118 N. Y. Supp. 207.

Same case on appeal, 196 N. Y. 452, 90 N. E. 174, 134 Am. St. Rep. 848.

Lordi v. People's Surety Co., 126 N. Y. Supp. 180.

Illinois Surety Co. v. Mattone, 138 App. Div. 173, 122 N. Y. Supp. 928.

A Court of Equity alone can afford a proper and just remedy for the protection of the claimants and the surety, where the aggregate of the several claims exceeds the penalty of the bond, and in such cases each claimant is interested in all claims presented for allowance and is entitled to be heard thereon.

Guffanti v. National Surety Co., 196 N. Y. 452, 90 N. E. 174, 134 Am. St. Rep. 848.

Illinois Surety Co. v. U. S. (C. C. A.), 226 Fed. 665.

American Surety Co. v. Lawrenceville Cement Co., 96 Fed. 25.

Guffanti v. National Surety Co., 118 N. Y. Supp. 207, and cases cited, *supra*.

Where the penalty of the bond is less than the aggregate of the claims arising thereunder, the surety is liable to each claimant for his pro rata part of such penalty, and if it pays any claimant more than his just share, it does so at its peril, and it is liable to other claimants for any such excess payment, although the aggregate it may thus be required to pay exceeds the penalty of the bond. The fact that the excess was paid in satisfaction of a judgment obtained against it in an action at law is not a good defense as against other claimants who were not parties to the action in which such judgment was obtained.

Commonwealth ex rel. Carson v. City Trust Safe Deposit and Surety Co., 224 Pa. 223, 73 Atl. 425.

Cappadonna v. National Surety Co., 125 N. Y. Supp. 162.

American Surety Co. v. Lawrenceville Cement Co., 110 Fed. 721, 723-724.

Laughlin v. American Surety Co., 51 C. C. A. 247, 114 Fed. 627.

In such cases, the proper procedure is a suit in equity for an accounting, to which the surety and all claimants are parties.

Illinois Surety Co. v. U. S., 226 Fed. 665.

Illinois Surety Co. v. Mattone, 122 N. Y. Supp. 928, 138 App. Div. 173.

Lordi v. People's Surety Co., 126 N. Y. Supp. 180.

Where several plaintiffs unite in an action against a surety for a judgment in their favor on a cause of action arising under one bond, they have a common and undivided interest in the moneys realized on such judgment, and it is sufficient for jurisdictional purposes that the amounts claimed and for which one judgment is sought against the surety collectively equal the jurisdictional amount.

Troy Bank v. Whitehead, 222 U. S. 39, 56 L. ed. 81.

Ill. Cent. Ry. Co. v. Adams, 180 U. S. 28, 45 L. ed. 410.

Marshall v. Holmes, 141 U. S. 589, 35 L. ed. 870.

Davis v. Schwartz, 155 U. S. 629, 39 L. ed. 289, 296.

Cowell v. City, etc., Co., 121 Fed. 53, 57.

Gibson v. Schufeldt, 122 U. S. 27, 30 L. ed. 1083.

Shields v. Thomas, 58 U. S. 3, 15 L. ed. 93.

Sinclair v. Cooper, 103 U. S. 105, 26 L. ed. 322.

Davies v. Corbin, 112 U. S. 36, 28 L. ed. 627.

Ex parte Nebraska, 209 U. S. 436, 52 L. ed. 876.

New Orleans, etc., Co. v. Parker, 143 U. S. 42, 36 L. ed. 71.

Under Sec. 29 of the Judicial Code, the jurisdiction of the State Court terminates upon the filing of a petition for removal and the bond and notice required to be filed under said section for the removal of causes, and all proceedings taken in the State Court after such filing and while the removal proceedings are pending and until the cause has been remanded to the State Court, are unauthorized and void, and the time within which the defendant must plead while such removal proceedings are pending is governed by Federal law.

Sec. 29, The Judicial Code.

Vol. 46, Congressional Record, p. 320, et seq.

Gordon v. Longest, 16 Pet. 97, 10 L. ed. 900.

Kanouse v. Martin, 15 How. 198, 14 L. ed. 660.

Home Life Ins. Co. v. Dunn, 19 Wall. 214, 22 L. ed. 68.

Mattoon v. Hinkley, 33 L. ed. 208.

The attempt of State Courts to exercise jurisdiction over causes after the Federal Court has assumed jurisdiction, or while the Federal Court has the question of its jurisdiction under consideration, has led to unseemly conflicts of jurisdiction.

Ches. & Ohio Ry. Co. v. McCabe, 213 U. S. 207, 208; 53 L. ed. 766.

Coeur d'Alene Ry. & N. Co. v. Spalding, 6 Ida. 97.

Dillon, Removal of Causes (5th ed.), p. 158.

Buxton v. Pennsylvania Lumb. Co., 221 Fed. 718.

Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354.

Congress in the new Judicial Code intended to provide an orderly procedure for the removal of causes and for the determination of the question of jurisdiction so as to avoid in the future the unseemly conflict that frequently arose under the old law where a State Court arbitrarily and in total disregard of the rule of comity between Courts, proceeded with the trial of the case before the question of jurisdiction had been determined by the Federal Court.

The Federal Court may restrain the collection of a judgment obtained in an action at law in a State Court, when such judgment was wrongfully obtained or the defendant was prevented from interposing a meritorious defense and when the collection thereof would for any reason be inequitable, unconscionable or unjust.

National Surety Co. v. State Bank, 120 Fed. 593.

Phillips v. Negley, 117 U. S. 665, 29 L. ed. 1013.

Marshall v. Holmes, 144 U. S. 589, 35 L. ed. 870.

Union Railroad Co. v. Illinois Cent. R. R. Co., 207 Fed. 745.

Embry v. Palmer, 107 U. S. 3, 27 L. ed. 346.

Where, on an appeal from an interlocutory order denying a preliminary injunction against the collection of a money judgment, the appeal would be ineffectual unless a supersedeas is granted so as to preserve the situation in *statu quo* until the case can be heard on the merits or the appeal disposed of, it is error for the District Court to require, in addition to a sufficient bond to protect the appellees, that appellant shall pay, if the order be sustained in its entirety, fifty dollars attorneys' fees to the solicitors for appellees, and interest on the judgment, the collection of which is enjoined, at the rate of 12 per cent. per annum, when under the laws of the State such judgment only bears interest at the rate of 7 per cent. per annum, and further providing that if the order be modified on appeal so as to permit appellees to collect a part of such judgment, appellees shall still be entitled to interest at the rate of 12 per cent. on the amount they may on appeal be held entitled to collect.

ARGUMENT.

WHERE THE PENALTY OF A BOND IS LESS THAN THE AGGREGATE OF THE CLAIMS MADE AGAINST A SURETY THEREUNDER, EACH CLAIMANT IS ENTITLED TO HIS PRO RATA PART THEREOF, BASED UPON THE AGGREGATE OF THE VALID CLAIMS TO BE DETERMINED IN A SUIT IN EQUITY TO WHICH ALL CLAIMANTS ARE PARTIES, AND A SURETY THAT PAYS ANY CLAIMANT MORE THAN HIS PRO RATA PART DOES SO AT ITS PERIL.

The learned District Judge holds that the proper procedure in a case of this kind is a suit in equity, like the case at bar, for an accounting, to which the surety and all claimants are parties. He likewise correctly holds that in cases where the penalty of the bond is less than the aggregate of the claims arising thereunder, each claimant is entitled only to his pro rata part of such penalty, and that the interest of each claimant is in effect adverse to that of every other claimant, and that all claims are therefore entitled to contest the allowance and payment of the claims presented. But, after having correctly stated the principles of law and equity applicable in cases of this character, the Court entered an order in direct conflict with the views thus expressed.

We have here the anomalous situation that the Court has in effect ordered the payment of claims, pending before the Court, before their validity has been determined. It exposes the surety to the peril of having to pay a claim first and submit to a deter-

mination of its validity afterwards in a contest between other parties. Surely, there must be some relief to a surety that is placed in that position.

The Court permits Clara Mills and her associates who hold a judgment acquired in the State Court, in an action to which none of the other claimants were parties, to collect forthwith their full share of the penalty of the bond on the assumption that the claims embraced in the judgment are valid and binding upon other claimants. Yet it holds, and we think correctly so, that the other claimants are unaffected by such judgment and that they have the right to contest the claims of Clara Mills and her associates to the same extent as if no judgment had been obtained. It is entirely probable, therefore, that the claims of the judgment creditors may be greatly reduced or that some or all of them may be thrown out entirely when the matter comes on for hearing in the accounting case to which all claimants are parties. Notwithstanding the share of the penalty of the bond to which the judgment creditors may be entitled, remains open and undetermined, the Court declined to temporarily enjoin such judgment creditors, upon any condition, from enforcing collection thereof against the surety, but leaves the judgment creditors free to collect an amount to which they could only be entitled if all their claims be hereafter found valid.

It is settled law that if a surety pays any claimant more than his just and fair proportion of the penalty of the bond, determined upon a hearing to which all claimants are parties, it does so at its peril; and in

this case it may well happen that other claimants can establish the invalidity of the claims of Clara Mills and her associates, or show that for some reason or other such claimants have lost the right to share equally or pro rata with other claimants in the penalty of the bond, and the liability of the surety to the Mills claimants cannot therefore be determined until the final decree is entered in the accounting case.

We have, therefore, the unusual situation that the hearing on the validity of the claims is to be held after the claims have been paid. At such hearing the claimants who have been paid will have little or no interest in the suit, and the burden of establishing the validity of such claims must fall upon the surety. Should it fail in this, it will be forced to pay more than the penalty of the bond. It would seem that even a foreign surety company for hire is entitled to protection when a condition of this kind arises.

The surety has been duly warned by other claimants to make no payment whatever to the Mills claimants until the amount to which they are entitled has been determined in a hearing to which all claimants are parties. See Bill of Complaint of William Leonard (Tr. pp. 36-52).

The District Court, referring to the fact that the Mills judgment was obtained in an action to which the other claimants were not parties, and the effect of such judgment, said:

“As already suggested, they might have instituted a suit in equity, by which the State Court could have laid hands upon the entire fund and

distributed it to all who were entitled to share therein, as their interests might appear, but instead of pursuing that course they brought an action at law, excluding therefrom others who were apparently equally entitled with them to share in the fund. *While the judgment so obtained might, in the absence of claims on the part of persons who were not parties to the suit, be conclusive upon the plaintiff, surely it cannot be held to conclude the rights of creditors who were not made parties to the suit.* Even if the view be taken that the judgment is conclusive of the question of the several amounts in which the judgment claimants were damaged by reason of the violation of the Bank Commissioner of the conditions of the bond, *a point I do not decide*, still the other claimants would have the right to be heard upon all matters touching the distribution of the fund in which they have an interest. And if, upon a full hearing, in a proceeding to which all claimants are parties, it turns out to be necessary, in order to avoid injustice, to limit the apparent judgment rights of Mills and her associates, that is a consequence for which they themselves are to blame, in that they did not bring into the suit in which they obtained their judgment all parties in interest.” (Our italics.)

These observations, as stated before, cannot be reconciled with the action of the Court in denying appellant a temporary injunction, until the validity of all claims can be determined, enjoining the Mills

claimants from enforcing the collection of the judgment or harassing the surety with writs of execution while the suit is pending for the determination of the amount due not only the Mills claimants but all other claimants under the bond. The fact that some of the claimants have obtained judgments against the surety in actions at law to which other claimants were not parties, does not relieve such judgment claimants of the necessity of establishing the validity of their claims as against the other claimants before they can rightfully enforce the collection of any part of their judgment.

In this case, the Federal Court has now taken jurisdiction of all parties for the purpose of determining the amount to which each may be entitled and distributing the penalty of the bond accordingly. While such proceedings are pending, it seems extraordinary that some of the claimants should be permitted by process from another Court to enforce the payment of their claims and to harass and annoy the surety with such process.

Upon principle and authority it would seem that appellant has the right to have all other proceedings against it under the bond stayed until there has been an adjudication of the claims and a distribution of the fund by the Court that has taken jurisdiction of the entire controversy and of all parties to it. In considering decided cases upon matters of this kind, we must necessarily compare the statutes under which they were decided, with those here involved.

Sec. 191 of the Idaho Revised Codes is as follows:

“The Bank Commissioner shall, before entering upon the duties of his office, take and subscribe an oath to faithfully discharge the duties of such office, and shall execute to the State of Idaho a bond in the sum of fifty thousand dollars, in some surety company authorized to do business in this State, conditioned that he will faithfully and impartially discharge the duties of his office, and pay over to the persons entitled by law to receive it all money coming into his hands by virtue of his office, and conditioned further for the payment of any and all damages and costs that may be adjudged against him under the provisions of this chapter and chapter 13, title 4, of the Civil Code, the cost of which bond shall be a charge against the State, to be audited and allowed as other claims, and which bond shall be approved by the Attorney General.”

A reference to the bond involved in the present case, which is attached to appellant's Bill (Tr. pp. 33 and 34), shows that it was executed precisely in accordance with this provision. A right of action on such bond is given by Sec. 295 of the Idaho Revised Codes in the following language:

“Every official bond executed by any officer pursuant to law is in force and obligatory upon the principal and sureties therein to and for the State of Idaho, and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in

his official capacity, and any person so injured or aggrieved may bring suit on such bond, in his own name, without an assignment thereof."

Very similar provisions are found in the United States bankruptcy act of 1898. Sec. 50 of that act provides for bonds of referees and trustees conditioned for the faithful performance of their official duties while Sec. 61 of the act provides for bonds by designated depositories.

Section 50h is as follows:

"Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the Clerk of the Court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions."

The recent case of *Illinois Surety Co. v. U. S.*, . . C. C. A. . . (7th Circuit), 226 Fed. 665, passed upon the effect of this statute. The action was brought by the United States for the use of certain trustees and receivers in bankruptcy proceedings and "any and all other receivers or trustees of estates in bankruptcy, pending in the northern district of Illinois, on a bond given by the La Salle St. Trust and Savings Bank, as principal, and the Illinois Surety Co., as surety, in the penal sum of \$50,000 on the designation of a bank has a depositary of moneys of bankrupt estates under the statute. The bond was conditioned that the bank should faithfully and honestly keep and fully account for and pay over according

to law all deposits and funds which it should receive as such depository. On demurrer, the defendant raised the point that equity alone had jurisdiction, while the action was pending on the law side of the Court. The objection so raised was overruled by the trial Court but was sustained by the Circuit Court of Appeals, the Court saying:

“A Court of Equity alone can afford a proper and just remedy, not merely adequate for the complainants (a defendant cannot object to an action at law because of mere inadequacy in this respect), but essential for the defendant’s protection.”

The Court said further:

“The object of the bond is to afford protection to all beneficiaries alike. The spirit of the whole bankruptcy act would be violated, if the vigilant depositor could, by suit in his own interest, exhaust the obligation. Each depositor is entitled only to his proportionate share. If, however, each depositor could bring an action at law for his own use to obtain his proportionate share, the possible diversity of opinion as to what that share is might result either in subjecting the defendant to judgments in excess of the penalty or in defeating the just claims of the later litigants. Only in a proceeding in which all interested parties will have an opportunity to be heard, and resulting in a judgment or decree that will be *res adjudicata* as to the surety as well as to all depositors, can justice be done. * * * *”

This case seems to establish clearly the interdependence of the claims of the various appellees here, and as the wording of the statutes and the bonds given are practically identical, seems a clear authority on the right to pro rate.

A similar statute which has been before the Court in numerous cases is the act of August 13, 1894, 28 Stat. L. 278, which requires contractors engaged in public work for the United States to execute the usual penal bond with the additional obligation that such contractor shall promptly make payments to all persons supplying him with labor and material, and provides further:

“Said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution.”

An interesting series of cases arose upon this bond, growing out of the difficulties of one William Morgan, who contracted to build a battery in the harbor at Portland, Maine, and afterwards defaulted, having become heavily indebted to numerous sub-contractors and material men and also to the United States, the amount of such indebtedness being greatly in excess of the amount of his bond. Some seventy suits at law were brought in the United States Circuit Court for the Maine District, and other suits were brought in the Southern District of New York

and other Courts, and some forty claims had not been sued on at all when the surety filed a Bill in Equity in the Circuit Court for the Maine District, seeking an injunction and accounting. In overruling various demurrers to the Bill of the surety company, Circuit Judge Putnam held that the equitable principle of pro rating applied, and that judgments at law obtained on such bond between a single claimant and the surety could not be binding upon other claimants. (See *American Surety Co. v. Lawrenceville Cement Co.*, 96 Fed. 25.) At page 26, the Court said:

“As to both of these questions, we are so clear that the equitable rule of pro rata distribution exists, not only between the United States and individual claimants, but also as between individual claimants themselves, that we do not find it necessary to elaborate the proposition. The United States, by the force of the statute which we have cited, voluntarily make themselves trustee, alike for their own interest and for the interests of the individuals intended to be protected; and, having thus voluntarily created and accepted a trust, they are barred by equitable principles from asserting for themselves any advantage over other beneficiaries. So, also, it must be held that the rights of the individual beneficiaries, as among themselves, relate back to the execution of the bond, and arise, by relation, out of the same transaction (that is, the execution of the bond), and as of the same time (that is, the date of its execution). On equitable principles,

all individuals who may acquire rights under the bond stand in the same relation to each other as holders of several obligations secured by the same mortgage or deed of trust, specified therein, but issued at different dates. There is only one underlying equity, which necessarily, on equitable principles, protects all interested, whether it be the United States or individuals, share and share according to the proportions of their several claims.”

At page 29, the Court also said:

“Marshaling assets, however, is a favorite equitable ground of jurisdiction. In this case, we have a quasi-fund—that is, the penal sum of \$18,000, named in the bond executed by the complainant—to be distributed on an equitable basis among numerous claimants. It will be found, as we proceed, that this fund cannot be distributed expeditiously or justly without the aid of this Court sitting in equity. On any of the suits at law which this Bill is brought to restrain being brought to judgment, it would be impossible to determine in a manner which would do justice, either to the claimants or to the American Surety Company, the pro rata amount which should be awarded therein. *The question must arise, once for all, in each of the common law suits as to the actual amount of the claim in each of the others, and the determination must be final; and yet it could not be made in such way as to bind the other suitors.*” (The italics are ours.)

After this opinion had been rendered, the case was referred to a Master, all the creditors, with the exception of the United States, who had not been parties to the bill having intervened, and the Master reported upon the amount to which the various claimants were entitled. The United States declined to submit to the jurisdiction of the equity court and prosecuted its action to judgment. (See *United States v. American Surety Co.*, 110 Fed. 913; 59 C. C. A. 256, 123 Fed. 287; 126 Fed. 811; 67 C. C. A. 552, 135 Fed. 78.)

The equity suit came before Judge Putnam again on confirmation of the Master's report, (110 Fed. 717), and he ordered an interlocutory decree enjoining further proceedings in the law actions and directing partial distribution. It appears from this decree that the individual actions at law were not prosecuted to judgment except in the case of the United States and one other action which apparently went to judgment before the reference to the Master. Certain claimants appealed from this interlocutory decree, and it was affirmed by the Circuit Court of Appeals, thus upholding the theory of pro rata liability and equitable jurisdiction to marshal the assets, according to the amounts of the claims as determined by the equity court. (*Laughlin et al. v. American Surety Co.*, 51 C. C. A. 247, 114 Fed. 627).

The final opinion and decree of the Circuit Court followed the same theory and applied the principle of pro rating as against the United States in its action at law as well. (See *U. S. v. American Surety*

Co., and U. S. v. Lawrenceville Co., 126 Fed. 811-815.) This decree was affirmed also by the Circuit Court of Appeals in United States v. American Surety Co., 67 C. C. A. 552, 135 Fed. 78. In all of these cases and in the case of United States v. Heaton, 63 C. C. A. 156, 128 Fed. 414, in the 3d Circuit, the principle that the surety in such cases was only liable to the creditors to the amount of the penalty of its bond, and where their claims exceeded such penalty was only liable pro rata, was affirmed; and it was held to be necessary to have all such parties in a single action where their relative rights could be determined.

The act of February 24, 1905, 33 Stat. at L. 811, amended the act of 1894, so as to expressly provide for payment pro rata where the fund was insufficient, and a procedure in which all claimants could be brought in was also provided for, hence the later Federal cases on bonds of this nature frequently rested upon the statutory provisions.

Another group of cases which are clearly analogous to the case at bar have arisen under the New York laws, 1907, Chap. 185, p. 263, as amended by Laws 1908, chap. 479. This statute provided as follows:

“All corporations, firms or persons * * * who carry on the business of receiving deposits of money for the purpose of transmitting the same to foreign countries shall * * * make, execute and deliver a bond to the people of the

state of New York in the sum of \$15,000 conditioned for the re-payment of such deposits and the faithful holding and transmission of any money * * * delivered to them for transmission * * * ”

Such statute also provides :

“A suit to recover on a bond required to be filed under the provisions of this act, may be brought by, or upon the relation of any party aggrieved in a court of competent jurisdiction.”

The case of *Guffanti v. National Surety Co.*, 133 App. Div. 610, 118 N. Y. Supp. 207, was an action in behalf of plaintiff and all others similarly interested to recover on a bond given under this statute by one Zanolini, who had absconded, and it appeared that the claims exceeded the amount of the bond. The court held that the action was properly brought in equity, and could not be brought in any other manner, and that all creditors were entitled to prorate. The court said :

“Second. The remaining question is whether the plaintiff can maintain the action in its present form. The undoubted purpose of the statute is to deter irresponsible parties from engaging in the business specified, and to provide a bond to indemnify creditors. By requiring a bond to be given a fund is provided for the payment of such creditors. Such fund, I think is not for one creditor but for all, and should be equitably distributed among all according to their respective

claims. It cannot be that the Legislature intended that the benefits to be derived from the bond were solely for the most diligent creditor if his claim happened to be in excess of the penalty of the bond; nor do I think it can be said, when the purpose of the statute is taken into consideration, that it was intended that each creditor, no matter what the amount of his claim might be, should be compelled to maintain an action at law, but, on the contrary, any one creditor might maintain an action on behalf of himself and all others similarly situated. An action at law by one creditor solely on behalf of himself is entirely inconsistent with the purpose for which the bond was required or given. Under statutes making stockholders liable for the debts of a corporation it has been repeatedly held that one creditor could not maintain an action at law to enforce such liability and collect his claim, but he must sue in equity on behalf of all creditors. *Mathez v. Neidig*, 72 N. Y. 100; *Griffith v. Mangam*, 73 N. Y. 611; *Pfohl v. Simpson*, 74 N. Y. 137; *Marshall v. Sherman*, 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654; *Hirshfield v. Fitzgerald*, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839; *Knickerbocker Trust Co. v. Iselin*, 185 N. Y. 54, 77 N. E. 877, 113 Am. St. Rep. 863; *Terry v. Little*, 101 U. S. 216, 25 L. Ed. 864. It has also been held that a creditor of a deceased husband cannot maintain an action at law to satisfy his individual claim from insurance moneys pur-

chased by excess of premium above \$500, which the statute provides shall be primarily liable for the husband's debts. *Kittel v. Domeyer*, 70 App. Div. 134, 75 N. Y. Supp. 150, approved on this point, 175 N. Y. 205, 67 N. E. 433; *Matter of Thompson*, 184 N. Y. 36, 76 N. E. 870."

The Court then cites and quotes with approval from the *Lawrenceville Cement Company* case (C. C.) 96 Fed. 25; *Pfohl v. Simpson*, 74 N. Y. 100; *Terry v. Little*, 25 Law Ed. 864; *Hirshfield v. Fitzgerald*, 46 L. R. A. 839. * * * The Court then continues:

"In that case (*Lawrenceville* case), as in the one now before us, each creditor's claim was distinct and his cause of action accrued as soon as the default occurred. The statute provided that any creditor might bring an action, but notwithstanding that fact the court held that the bond should be enforced by an action in equity to secure the ratable distribution of the proceeds among all the claimants. Here the respondent is liable upon its bond to the extent of \$15,000. There are, as already stated, numerous creditors, and the sum named is insufficient to pay them in full. They have equal rights that their claims be satisfied from the proceeds of the bond, and the statute under which it was given undoubtedly contemplated that they should share equally. This result can only be obtained by an action in equity on behalf of all the creditors.

“My conclusion, therefore, is that under the facts stated in the complaint a court of equity is justified in assuming jurisdiction of the action, and that the plaintiff is not only entitled to maintain the action on behalf of himself and all other creditors, but that he would be precluded from maintaining it in any other form.”

This decision was affirmed by the Court of Appeals of New York, under the same title, 196 N. Y. 452, 90 N. E. 174, 134 Am. St. Rep. 848. The court there said:

“In this case it appears that the money of one hundred and fifty or more persons deposited with the defendant Zanolini has neither been faithfully held nor transmitted as provided by the terms of said bond. The total amount of the claims exceed the penalty of the bond and the claims of each of said persons against the defendant surety company arises out of the same instrument and are dependent upon the same contract. The penalty of the bond is the measure of the total liability of the defendant surety company and the depositors with Zanolini must lose the amount of such deposits unless they are collected from the bond. A just and equitable payment from the bond would be a distribution pro rata upon the amount of the several embezzlements. Unless in a case like this the amount of the bond is so distributed among the persons having claims which are secured thereby, it must

necessarily result in a scramble for precedence in payment, and the amount of the bond may be paid to the favored, or to those first obtaining knowledge of the embezzlements.”

In the above case, the point was emphasized that the action must be in equity because all the claimants on such bond were interested in the amounts recovered or claimed by the others, because such claims would, if sustained for more than the claimants were justly entitled to, reduce their own claims to that extent.

Another case holding that single actions at law on such bond were not maintainable is *Lordi v. People Surety Co.*, 126 N. Y. Supp. 180.

The case of *Illinois Surety Co. v. Mattone*, 138 App. Div. 173, 122 N. Y. Supp. 928, is exactly in point with the case at bar. It was an action to restrain prosecution of numerous suits against the complainant on such a bond, to determine its liability on the bond and to have the amount of such liability distributed equitably to the persons having valid claims under the bond. There were actions at law pending in various courts and some actions which had already gone to judgment, and there was in addition a suit by a creditor named Imperato, in behalf of himself and all others, pending in the same court for distribution in equity. The court awarded the injunction, holding that the depositors were only entitled to their pro rata part and that the denial of any liability whatever by the Surety Company was not

necessarily fatal, and requiring the company to pay into court the amount of the bond, to be held subject to disposition in accordance with the final decree. The injunction ran against all the actions, except the equity action by Imperato, and required all parties to come in to the equity actions and establish the validity of their claims regardless of whether or not they had judgments at law. The court's opinion is very instructive, hence we quote from it at length:

“The question of the liability of the plaintiff upon its bond may be said to have been finally decided against it so far as concerns the courts of this state. *Guffanti v. National Surety Company*, 133 App. Div. 610, 118 N. Y. Supp. 207, affirmed 196 N. Y. 452, 90 N. E. 174; *Musco v. United Surety Co.* 132 App. Div. 300, 117 N. Y. Supp. 21, affirmed 196 N. Y. 459, 90 N. E. 171. The plaintiff, however, is liable in the aggregate only to the amount of its undertaking, and that amount constituted a fund for the payment of the creditors pro rata, and is to be distributed among them equitably according to their respective claims. Mere diligence in prosecuting a claim against such a fund will not entitle the prosecuting claimant to a priority of payment. The fund can therefore be reached only by an action in equity prosecuted in a court possessing equitable jurisdiction; for ‘an action at law by one creditor solely on behalf of himself is entirely inconsistent with the purpose for which the bond was required or given.’ *Guffanti v. National*

Surety Co., *supra*. The several defendants in this action who have begun actions at law in courts possessing no equitable jurisdiction can therefore apparently take nothing by their actions, and will suffer no real prejudice if such actions are stayed until an action, properly brought in equity, can be prosecuted to final judgment. It is true that the Musco case, above cited, was an action at law by an individual claimant to recover his own loss, and was not for the benefit of creditors generally, and it also appears by the complaint in this action that judgments have been obtained against plaintiff in courts having no equitable jurisdiction. It does not appear, however, that the point was taken in any of these actions that an action at law would not lie at the suit of a single creditor, and in the Musco case it does appear that no such question was discussed or considered. But even if plaintiff can successfully defend, upon this technical ground, the numerous actions brought against it at law, it is unreasonable that it should be compelled to incur the expense of doing so, when the claims of all parties can be equitably determined and adjusted in an action properly brought for that purpose.

“It is suggested that plaintiff can obtain all the relief necessary for its protection in the representative action in equity brought by the defendant Imperato in behalf of himself and all others similarly situated. It is true that the com-

plaint in that action asks for an injunction restraining actions at law for the recovery of individual claims, but it does not appear that the plaintiff in that action has applied for or obtained such an injunction, nor is it suggested how this plaintiff, as a defendant in that action, could procure an injunction against his co-defendants. He can obtain such relief in that action only by the grace of the plaintiff therein, and should not be called upon to rely solely upon so slight a dependence. It is well settled that a Court of Equity has jurisdiction to entertain an action of this nature. In cases where many persons have claims and are prosecuting or are about to prosecute them at law against one of the defendants or class of defendants or a fund liable in equal degree to all those persons and to others, the Court in Equity, to forestall a multiplicity of actions, has jurisdiction of an action for a general accounting and adjustment of all the rights, and to restrain separate and individual actions at law in the same or other Courts, thus bringing all the litigation into one suit." *Pfohl v. Simpson*, 74 N. Y. 137. There are numerous cases sustaining the rule above quoted. *Board of Supervisors v. Deyoe*, 77 N. Y. 219; *Kellogg v. Siple*, 11 App. Div. 458, 42 N. Y. Supp. 379, and authorities cited in *Musco v. United Surety Co.*, *supra*. It has been suggested that many of these authorities are not applicable, because the plaintiff denies all liability upon the bond. This, however, is not

necessarily fatal. It has been held that such an action can be maintained to determine a large number of claims to a fund in Court, although the plaintiff insists that none of the claimants are entitled to any share in the fund (Kellogg v. Siple, *supra*). Such an action as this is not in the nature of an action of interpleader wherein several parties make conflicting claims to the same fund, but is entertained for the purpose of preventing a multiplicity of actions. There should, however, be complete assurance that the claimants, whose affirmative actions have been restrained, will, if successful, find a fund applicable to their payment, and which the Court can so apply in this action. The plaintiff is a foreign corporation, and though it is doubtless entirely solvent at the present time, and has made such provision as our statutes require for the protection of creditors in this State, no one can foresee what the state of affairs may be when this action goes to final judgment. If the plaintiff who seeks a favor at the hands of the Court should deposit in Court the sum represented by its bond to remain subject to final judgment in this action, an injunction *pendente lite* against all claimants who have brought or threaten to bring individual actions at law could properly be granted. There is no reason, however, in any case, for enjoining the prosecution of the representative action in equity already brought by the defendant, Imperato, for all the questions involved can be as satis-

factorily and equitably settled in that action as in this. The motion as it was presented at Special Term was properly denied, but the order appealed from will be so modified as to reserve to plaintiff the right to renew the motion upon compliance with the suggestions contained in this opinion, and, as so modified, will be affirmed, with \$10 costs and disbursements to each respondent who appeared and filed a separate brief. All concur."

In another case arising under this statute, that of Cappadonna v. Illinois Surety Co., 125 N. Y. Supp. 162, the Court was clearly of the opinion that payment of judgments obtained at law on such a bond to the full amount of the penalty would not discharge the surety from liability, because all payments in excess of the pro rata share of the judgment creditor based on the total amount of valid claims were held to be voluntary payments.

The same rule was clearly announced in Commonwealth ex rel. Carson v. City, etc., Surety Co., 224 Pa. 223, 73 Atl. 425. Here several suits had been brought on a bond given to the United States for public work under the statute above quoted. The total amount of the bond was \$6695. The surety had paid a judgment for \$3625.70 and an uncontested claim for a small amount. Another claim for about \$8,000 had been contested and when the matter came before the Pennsylvania Court, both the claimant and the surety company were in the hands of receivers. The claimant contended that it was entitled to its

pro rata share, while the surety urged that claimant was only entitled to the difference between the amount paid and the penalty. The Court sustained the claimant's contention, although this resulted in a payment in excess of the penalty of the bond. On this point the Court said:

“The auditor, instead of limiting the recovery to the difference between the amount previously paid by the surety company and the penal sum, ascertained the per centum the creditors would be entitled to on an equal distribution between all, and as a result awarded to the bridge company the sum of \$4536.58. The report of the auditor was approved by the Court below, and it meets with our approval as well. Whatever the surety company will have paid on this contract of suretyship in excess of its legal liability therein must be regarded as a voluntary payment by it. Its covenant, while with the government, was exclusively for the protection of the contractors under the Penn Erecting Company. When the surety company entered into the covenant, it did not know, and could not have known, the parties with whom the erecting company would contract, the amounts that would be due each, or the times of payment, but it must have understood its covenant to be for the protection of all alike; that is to say, that each was to share in the protection of the covenant on an equitable basis. Whether it did so or not it is the plain and manifest meaning of the bond. The sub-contractors, not a select-

ed few, but all embraced in the class, are the real use parties. It matters not that their names are not written in the bond. They could not have been, because the bond was a condition precedent to the awarding of the contract; but the use is as clearly defined as though their names appeared. Besides, to allow the surety, either through favoritism or neglect, to work out a result which would give priority to some creditor or creditors over others, would be to defeat the very purpose the government has in view in requiring bonds for the protection of sub-contractors. *The surety company is without the slightest equity. It paid the judgments obtained against it with full knowledge of the fact that there was then an outstanding and unsatisfied claim of the bridge company, then in suit, for an amount which, together with the claims already liquidated, much exceeded the limit of its own liability. Yet, with knowledge of this fact, it proceeded to pay some of the creditors in full. It is no excuse to say that these payments were made to avoid execution. Threatened execution could and should have been met by appeal to the Court to put its restraining hand upon the creditor who would attempt to use its process, not for the collection of his own debt solely, but in part to defeat some one else in equal right with himself, in the fund to be subjected, and that too at the cost of the surety.*" (Our italics.)

A similar question arose upon distribution to said claimants in the Lawrenceville Cement Co. litigation,

supra, where it was held by both the appellate Court and the trial Court that claimants were only entitled to their pro rata share, and the fact that the surety had been reimbursed for payments made to certain creditors did not enlarge the equity of the other creditors. (See *Am. Surety Co. v. Lawrenceville Cement Co.*, 110 Fed. 721, at pp. 723 and 724; *Laughlin v. Am. Surety Co.*, 51 C. C. A. 247, 114 Fed. 627.) From these cases, it appears clearly that the liability of the surety in any case where the total amount of valid claims is in excess of the penalty of its bond, is not the amount of the claims of the various parties, but their pro rata share, and that the other claimants have an unquestionable right to contest the allowance of such a claim, or its payment, by the surety, unless they have been made parties to the suit in which the amount of such claim was determined; and inasmuch as the surety company pays any claim, either before or after suit or judgment, at its peril, and if it later develops that the amount paid was in excess of the pro rata share of the claimant, the surety is not entitled to credit for such excess, it seems clear that the enforcement of the Mills judgment in the present case should have been restrained in its entirety until the validity of such judgment against appellees, Leonard, Dithmer and others, had been determined.

In connection with the cases last cited, the allegations in the Bill (Tr. p. 20) that appellees, Clara Mills and others, named in paragraph IX, have collected large amounts as dividends, become important. If these parties can recover judgment and enforce

collection for their proportionate share of their deposits, based on the total amount of deposits, without accounting for dividends, they can, in theory at least, have a double recovery. So far as the record in this case shows, appellees may, under the order from which the appeal is taken, collect from the surety notwithstanding the full amount of their claims may be paid them by the receiver of the bank. There is no proof of damage or loss in this record and no protection whatever is afforded appellant as to the application of the dividends received from the bank.

The appellees, Clara Mills and her associates, sought to recover from the surety the full amount of their deposit in the bank at the time it closed its doors, without any showing or proof of the amount they might eventually recover from the bank. They chose to look to the surety for payment, on the theory that the surety could in turn step into the shoes of the appellees or be subrogated to their rights to collect the dividends from the bank; but it later developed that, while they were demanding payment from the surety of the full amount of their deposits, they were also drawing dividends from the bank without reducing their demands against the surety. The Court at the last moment, in providing for the supersedeas bond, provided that if this Court should hold that appellees could not hold or retain both the dividends received from the bank as well as the pro rata part of the penalty, then appellant should pay appellees their pro rata part less any dividends hereafter received "with interest at the rate of 12% from

December 9, 1915." The provision, however, regarding the deduction of dividends from the pro rata share is conditioned upon the order appealed from being modified in that respect by this Court.

We respectfully submit that the penalties imposed in connection with the supersedeas are not only unusual but we think are absolutely without precedent. In the State of Idaho, judgments bear interest at the rate of 7% per annum, and the highest rate authorized by contract is 12%. The Court, therefore, went to the very limit of the usury laws in penalizing appellant for taking an appeal. The appeal would have been ineffectual without the supersedeas. In order, therefore, to obtain an appeal from an order that clearly seems a proper subject for review, appellant had to submit to a penalty of 5% increase in the interest rate on the judgment, and an attorney's fee for \$50, and the interest penalty is to be imposed, notwithstanding the order appealed from is modified to a very large degree by this Court. We submit that in justice to appellant, if the order appealed from is not set aside, this Court should protect appellant against the penalties imposed as a condition for a supersedeas.

COURTS OF EQUITY WILL ENJOIN THE ENFORCEMENT OF UNCONSCIONABLE OR INEQUITABLE JUDGMENTS OBTAINED AT LAW WHERE DEFENDANT HAS BEEN PREVENTED FROM INTERPOSING A MERITORIOUS DEFENSE.

The record in this case shows that while appellant was in good faith removing its cause from the State

Court to the Federal Court, the attorneys for appellees, without notice to the attorneys for appellant, prevailed upon the Clerk of the State Court to enter appellant's default, and that they later objected to such default being set aside and to appellant being permitted to plead to the complaint, notwithstanding it had a good and meritorious defense to the action and offered to submit to such terms as the Court might deem reasonable under the circumstances and to pay such damages as had been or would be sustained by the plaintiffs in said action, Clara Mills and her associates, because of the setting aside of such default, but all of such offers were refused by said appellees and their attorneys. We submit that a judgment obtained under such circumstances may be enjoined by a proper suit in equity, and the District Court should have granted the injunction prayed for on that account if there had been no other sufficient reason for the injunction.

Should the foregoing contentions of appellant be sustained by this Court, it will be unnecessary to take up the construction of Sec. 29 of The Judicial Code. The validity of the judgment which appellees seek to enforce rests upon the construction of that section. It is alleged in the bill that the action commenced by appellees in the State Court was removable to the Federal Court and that proper proceedings for the removal of that cause were instituted by appellant and that while such removal proceedings were pending appellant's default was entered in the State Court. If the cause was removable, as

admitted by the motion to dismiss, there can be no question that the State Court was clearly without jurisdiction to enter default or a judgment based thereon. We deem it unnecessary to cite authorities or extend the argument on that proposition. If, however, the cause was not removable but the proceedings were nevertheless in good faith instituted and the default of appellant was entered while such removal proceedings were pending, we still insist that, under the recent amendments to the removal statutes, the time within which a defendant who seeks to remove a cause must plead to the complaint or petition filed by plaintiffs in such cause is governed by Federal law until the cause has been remanded to the State Court, and that the jurisdiction of the State Court terminates upon the filing of the proper petition and bond with written notice served on counsel for plaintiffs, and this we shall now consider at some length.

COMPLIANCE WITH SECTION TWENTY-NINE OF THE
JUDICIAL CODE TERMINATES THE JURISDICTION
OF THE STATE COURT, WHICH IS NOT RESTORED
UNLESS OR UNTIL THE CASE IS REMANDED.

The precise effect of the changes made by Section 29 of the Judicial Code in the procedure for removal upon the relative jurisdiction of the State and Federal Courts has never been judicially determined.

Section 3 of the Removal Act of March 3rd, 1875, as amended (4 Fed. Stat. Ann. 349), provided in part as follows:

“That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a State Court to the Circuit Court of the United States, he may make and file a petition in such suit in such State Court at the time, or any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the Circuit Court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such Circuit Court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said Circuit Court if said Court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State Court to accept said petition and bond, and proceed no further in such suit; and the said copy being entered as aforesaid in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court.”

Section 12 of the Judiciary Act of 1789, 1 Stat. L. 79, was similar to the section just quoted, the chief difference being a provision as to the amount in controversy.

Section 29 of the Judicial Code of March 3rd, 1911, is as follows (*italics show changes*) :

“Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State Court to the *District* Court of the United States, he may make and file a petition, *duly verified*, in such suit in such State Court at the time, or any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the *District* Court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such *District* Court, *within thirty days from the date of filing said petition*, a *certified* copy of the record in such suit, and for paying all costs that may be awarded by said *District* Court if said *District* Court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State Court to accept

said petition and bond and proceed no further in such suit. *Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same.* The said copy being entered *within said thirty days* as aforesaid in said *District Court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said District Court.*"

The changes made in the wording of the section as shown above are quite radical, and in order to determine the effect to be given such changes we must, as held in *Eddy v. Chicago & Northwestern Ry. Co.*, 226 Fed. 120, in construing sections 29 and 51 of the Code, consider both the history and intent of the legislation on the subject.

The first case in which the Federal Courts seem to have passed upon the question of a conflict of jurisdiction in a case sought to be removed was *Gordon v. Longest*, 16 Peters 97, 10 L. ed. 900, decided in 1842. The Court there held that the steps taken by the State Court after the filing of the removal petition and bond were *coram non judice* and void, saying at page 903:

"This is the first instance in which the State Court has refused to a party the right to remove his cause to the Circuit Court of the United States."

In *Kanouse v. Martin*, 15 How. 198, 14 L. ed. 660, decided in 1853, counsel for the defendant in error contended that the State Court retained jurisdiction to determine whether the jurisdictional amount was involved, but the Court held that the jurisdiction of the State Court ceased on filing the petition and bond and that plaintiff in error was not bound to plead in the State Court.

In *Home Life Ins. Co. v. Dunn*, 19 Wall. 214, 22 L. ed. 68, decided in 1873, the Court held that the State Court had no jurisdiction to determine whether or not a case was removable. The Court said at page 69:

“The cause was out of the Common Pleas and in the Circuit Court. The former had jurisdiction to remit and the latter to receive it. Being in the latter, that Court had jurisdiction to retain it. If there were error on the part of the Circuit Court in overruling the motion to dismiss, because the case had been improperly brought there, the remedy should have been sought in the Federal Courts. The State Courts were incompetent to give it. The authority of the latter was at an end until the case should be restored, if that were ever done, by the action of the former. * * * *

“The conditions prescribed having been complied with, the Act of Congress expressly required the State Court, where it was originally pending, ‘to proceed no further in the suit.’ The further proceedings of the Common Pleas was a clear

case of usurped jurisdiction. The illegality was gross. The action of the District and Supreme Court of the State gave them no validity."

Another early case in the State Court is that of *Mattoon v. Hinkley*, 33 Ill. 208, in which the facts were practically identical with those involved here. The State Court had entered a default after petition for removal had been filed, and the Supreme Court of Illinois held that this was erroneous and without jurisdiction and reversed the judgment entered therein.

In *Phoenix Ins. Co. v. Pechner*, 95 U. S. 183, 186; 24 L. ed. 427, decided Nov. 19, 1877, the Court held that in order to terminate the jurisdiction of the State Court, not only must the petition and bond be in proper form but the petition must state facts which, taken with those already appearing from the record, entitled the party to a removal to the Federal Court. This case has been followed in many cases, although such construction seems to nullify the express provision of the statute, that the State Court shall proceed no further in such suit and has resulted in what the Supreme Court of the United States, in *Chesapeake and O. Ry. Co. v. McCabe*, 213 U. S. 207, 53 L. ed. 765, has very properly called an "unseemly conflict of jurisdiction."

The only restraint upon this conflict is the State Court's conception of comity, and as shown by the McCabe case, *supra*, and numerous other decisions in both State and Federal reports the principle of

comity has been wholly insufficient to protect litigants in their rights. Other cases showing this conflict of jurisdiction are *Morbeck v. Bradford-Kennedy Co.*, 19 Ida. 83, 113 Pac. 89; *Buxton v. Penn Lumber Co.*, 221 Fed. 718, and *State, for the use of Mills, et al., v. American Surety Co.*, 26 Ida. 652, 145 Pac. 1097, the last case being the decision of the Supreme Court upon the appeal from the judgment obtained against appellant by appellees, Clara Mills and others.

The result of the rule in *Insurance Co. v. Pechner*, *supra*, is highly anomalous. A defendant, entitled under the law to a removal, is often compelled by necessity to proceed in both the State and the Federal Courts at the same time. It is a matter of common knowledge supported by a multitude of reported cases that the question of Federal jurisdiction is frequently in doubt and at times exceedingly close. It is a question upon which Federal and State Courts differ repeatedly, and there is a twilight zone in which the line of demarkation between Federal and State jurisdiction is so faint that even learned judges do not see it alike; nevertheless, under this rule, if a defendant seeks a removal and the State Court does not voluntarily give up jurisdiction as a matter of comity, the defendant must proceed in both Courts at the same time. Only the Federal Court can decide the right of removal, so he must take the case there for such determination or await the tedious process of contesting the case through the trial and appellate Courts of the States to the United States Supreme Court.

If he takes his record to the Federal Court, and that Court retains jurisdiction, he can restrain further proceedings in the State Court and such proceedings will be held void, although it may be necessary for him to go to the Supreme Court of the United States in order to have them held void. (See *Insurance Co. v. Dunn*, *supra*.) If, however, the Federal Court remands the case, all the proceedings in the State Court are by the above rule held to be valid, although taken pending the determination of the right to remove. In short, under this rule, a party seeking to remove a cause, acts at his peril and must proceed in the State Court exactly as if he did not have a right to remove, and this we do not think was contemplated by the framers of the Judicial Act of 1789, or any of the amendments made thereto, when they inserted the provision that "it shall be the duty of the State Court to proceed no further in such suit."

It would seem that the settled practice down to 1877 had been that the State Court's jurisdiction absolutely ceased on the filing of the petition and bond for removal, and that that Court had no power or discretion whatever in the matter, as held in *Gordon v. Longest*, *supra*, and that the rule announced in the *Peckner* case was a departure from this practice which had been followed for eighty-eight years. What the underlying reasons for the rule in that case were the opinion itself does not indicate nor do any of the later cases following it, but it may have been adopted with reference to the delays possible under the removal statutes at that time. The party removing the

case was not required to file his record in the Federal Court till the first day of the next session, and this might be six or nine months distant and during all this time the other party could not move to remand the cause and have the question of removal determined. Furthermore, the party removing did not have to plead in the Federal Court until the record was filed on the first day of the term and this would frequently throw the case over that term of the Court. It is a well-known fact that during the last forty years there has been a great increase in the number of causes removed to the Federal Courts, and undoubtedly removal was sought in many cases without sufficient ground in order to delay trial of the cases, although this subjected the party to a liability on his bond. On this practice the rule in the Pechner case would have a salutary effect, because it allowed the State Court to determine whether there was any basis for removal, and if not, to proceed subject to its action being held void if the Federal Courts held the cause was removable. This rule, however, worked an undoubted hardship upon parties who sought removal in good faith because it placed them at the mercy of the State Court and compelled them to litigate their rights in two forums at the same time.

The State Courts, as shown by the reports, have been very jealous of attempts to escape from their jurisdiction to that of the Federal Court, and we think their general attitude is shown by the action of the Idaho Courts in upholding the default judgment obtained by appellees, Clara Mills and others.

against appellant and out of which the present action arose. This appears quite clearly in the opinion of the Supreme Court (26 Ida. 669-670), where it is said:

“In such a case, another principle is involved; that is: What are the rights of the plaintiff where the defendant does appear and attempts to gain what it thinks is an advantage over the plaintiff and a benefit to defendant? In such cases, the defendant becomes an actor; it is aggressive in its own interests and seeks to use its time in an unlawful procedure for its own advantage. It is then that Courts considering the rights of both parties hold that the plaintiff cannot be charged with such acts of the defendant, and in dealing with substantial justice will require the defendant to assume the risk and consequences that follow its wrongful and unsuccessful procedure.”

The Idaho Court seems to think there is something illegal and wrongful in the action of a party seeking to remove a cause to the Federal Court, notwithstanding his good faith in believing he has a right to such removal, and under the rule in the Pechner case, it had an opportunity to penalize bona fide attempts by non-residents to remove.

In this connection, the observations of the Supreme Court of the United States in the case of *Harrison v. St. Louis, etc., Ry. Co.*, 232 U. S. 318, 334; 58 L. ed. 621, at page 625, in holding an Oklahoma statute

directed against removal proceedings by foreign corporations unconstitutional, are very pertinent. That Court said:

“With this general principle in hand, let us come to fix one or more of the essentials of the right to remove as a prelude to testing the assailed statute and the action taken under it. In the first place, the right, unrestrained and unpenalized by State action, on compliance with the forms required by the law of the United States, to ask the removal of a cause pending in a State to a United States Court, is obviously of the very essence of the right to remove conferred by the law of the United States. In the second place, as the right given to remove by the United States law is paramount, it results that it is also of the essence of the right to remove, that when an issue of whether a prayer for removal was rightfully asked, arises, a Federal question results which is determinable by the Courts of the United States free from limitation or interference arising from an exertion of State power. In the third place, as the right freely exists to seek removal unchecked or unburdened by State authority, and the duty to determine the adequacy of a prayed removal is a Federal and not a State question, it follows that the States are, in the nature of things, without authority to penalize or punish one who has sought to avail himself of the Federal right of removal on the ground that the removal asked was unauthorized or illegal.”

It seems perfectly apparent, when these two quotations are considered together, that the Idaho Courts have assumed to do exactly what the United States Supreme Court says cannot be done, for they have penalized an attempted removal of a case which the removing party was certainly justified in considering removable, on the theory that such removal was unauthorized and illegal and an act which in some unexplained way savored of unfair and unconscionable dealing. We do not think that such a position could or should be sustained.

The rule we have been discussing was the rule of construction under the removal statutes prior to the Judicial Code, and the question naturally arises whether such construction is to be applied to that Code, notwithstanding the radical changes made by Sec. 29. These changes are shown by the italicized portions of the section which we have quoted above and are, briefly, the requirement of a *verified* petition, the limitation of the time within which to file a certified copy of the record in the Federal Court to *thirty days* from filing petition for removal, the provision that the removing party must *plead, answer or demur* in the Federal Court within *thirty days* after the record is filed there, and the requirement that *written notice* of the petition and bond for removal must be given to the adverse party before they are filed. The first three of these requirements seem clearly to be for the purpose of procuring a speedy and expeditious joinder of issue on the right to remove the cause as well as on the merits of the case,

and to the prevention of sham and fictitious removals, or removals merely for the purpose of delay. It also seems clear that the provision as to pleading in the Federal Court must do away with any necessity for pleading in the State Court prior to removal, and it has been argued, though, so far as we have found, not sustained, that this last provision makes any pleading in the State Court a waiver of the right to remove.

But what is the purpose of requiring notice to be given to the adverse party before the petition and bond are filed? It has been suggested in *Cropsey v. Sun Publishing Assn.*, 215 Fed. 132, that the purpose is merely to advise plaintiff of defendant's intention to remove, but this seems a somewhat insufficient explanation. The Courts have held that the requirement of notice is mandatory and a matter of substance. See:

United States v. Sessions, 123 C. C. A. 570,
205 Fed. 502.

Loland v. N. W. Co., 209 Fed. 626.

Warner v. Bissinger, 210 Fed. 96.

Goins v. Southern Pac. Ry. Co., 198 Fed. 432.

If the purpose of notice is merely to advise plaintiff of defendant's intention and it has no binding effect, the requirement of notice serves no useful purpose, and there is no reason for holding it mandatory.

On the other hand, it is equally clear that the requirement of notice is not for the purpose of having

a determination on the question of removal in the State Court.

United States v. Sessions, *supra*.

Cropsey v. Sun Pub. Co., *supra*.

Goins v. So. Pac. Ry. Co., *supra*.

Harrison v. St. Louis, etc., Ry. Co., 232 U. S. 318, 58 L. ed. 621.

It would seem a more reasonable explanation of the requirement of notice that such notice is in the nature of process, and when it has been served and filed and a petition and bond for removal in proper form have been filed, that the notice amounts to an appearance by the party seeking removal, and is a notice both to the adverse party and to the Court that all further proceedings in that Court are terminated and that the adverse party has the right from such date to insist upon a strict compliance with the requirements of Sec. 29, or the attempted removal will fail. When thus explained, the purpose of the statute becomes entirely clear and the requirement is brought in line with the other changes in the section, because this provision tends to secure a speedy determination of the right to remove and an orderly procedure for securing such determination.

Clearly, where the Federal Court, which alone can pass upon the question, holds that the case is not removable and remands it, the jurisdiction of the State Court is restored, and probably the same would be held where the party failed to file a certified copy of the record in the Federal Court within the thirty days.

There is no longer any reason for applying the rule adopted by the Supreme Court in *Insurance Co. v. Pechner*, because then the requirement of a verified petition and notice and the strict limitations of time within which an issue of law may be framed do away at once with delay and with sham attempts at removal. The condition of the bond is for payment of all costs and damages if the suit is wrongfully or improperly removed, and Sec. 37 provides for a remand in case of such improper removal, and these two provisions clearly contemplate that in some instances it may develop that the Federal Court has acquired jurisdiction which it cannot retain. In such cases, it is the purest fiction of law to hold that the State Court never lost jurisdiction, and the logical conclusion would be that by a compliance with the forms prescribed by the statute, it did lose jurisdiction, but this jurisdiction was later restored.

In *United States v. Sessions*, 123 C. C. A. 570, 205 Fed. 502, the notice was served after the petition had been filed, and the Federal Court refused to remand for this reason. The case was before the Circuit Court of Appeals on application for mandamus which was denied. The Court said:

“The language in form is imperative. Why should not such prior notice be regarded as an essential step in the process of removal? The rule is that, since the right to remove is statutory, in order ‘to effect a transfer of jurisdiction all the requirements of the statute must be followed.’ (*Babbitt v. Clark*, 103 U. S. 606, 610; 26 L. ed.

507.) The provision is either mandatory or inoperative. There is no middle course. The mandate must be carried into effect, or be practically destroyed. However, we cannot at this stage definitely pass upon the question, for after all the present record presents only a question of jurisdiction. The power in a District Court to determine such a question *applies as well to a case without as to a case within its jurisdiction.*" (The italics are ours.)

Perhaps the best discussion on the question of notice is that of Judge Van Fleet in *Goins v. So. Pac. Ry. Co.*, 198 Fed. 434, pp. 432 and 435, where it is said:

"The right of removal is justly regarded as one of great moment to the suitor, and its exercise not infrequently involves important changes in the aspects, if not the results of the controversy; and the history of many cases involving the right tends to disclose the great desirability, if not the necessity, in order to fully protect the rights of the adverse party, by avoiding expensive and unseemly delays and other inconveniences of a more or less serious nature that some notice of the proceeding be had. Appreciating this, Courts in some instances have undertaken to supply the omission by a rule requiring notice (*Chiatovich v. Hanchett*, (C. C.) 78 Fed. 193; *Creagh v. Equitable, etc., Co., Soc.* (C. C.) 83 Fed. 849); and while they have eventually been compelled to hold that, no notice being required by the statute,

none could be insisted upon as essential to the exercise of the right, no Court has undertaken to belittle the value of such a provision in the law. The matter of surprise is, therefore, in view of the importance of the right, not that Congress should now have seen fit to make the requirement, but that it should not have earlier perceived the propriety of so doing. Without the effect of materially changing the method of procedure, it will tend to protect the parties and the Courts as well, not alone against mistakes and delays in proceedings genuinely instituted, but against unwarranted and frivolous attempts to exercise the privilege in instances where no real right exists. And, speaking in a general way, I entertain little doubt that it was for reasons such as indicated in the class of cases referred to that the requirement of notice has been prescribed."

In *Buxton v. Pennsylvania L. Co.*, 221 Fed. 718, 725, the Court says:

"If, as contended, after the provisions of the Judiciary Act have been complied with, the State Court may nevertheless retain jurisdiction of a removable cause until it is taken away by the Supreme Court, of what avail are the provisions of the removal statute? Why should the Circuit Court be clothed with power to command the State Court to make return of the record? Why, notwithstanding such refusal, is the party desiring removal permitted to enter the record in the Federal Court, and thus impose on that Court the

duty to proceed in the same manner as if the cause had been originally commenced in that forum? And why is it made a criminal offense in the Clerk of the State Court to refuse a copy of such record when his legal fees are tendered by the party desiring removal?

“It is unthinkable that Congress would provide such an elaborate procedure if it could be of no avail without the consent of the State Court, or until the Supreme Court of the United States had so directed. The right of removal is one conferred by the Federal statute. It is therefore a Federal question. An order of removal by the State Court is unnecessary. My attention has been called to no authority which holds the contrary. The right of removal is in no wise dependent on the judgment of the State Court. * * * * ”

It thus appears that there has been some doubt as to just what effect should be given to the changes made in Sec. 29, and, under these circumstances, the query naturally arises: What was the intention of Congress when it made these radical changes in the statute? It is a matter of legal history that the question of revising the Federal Judiciary procedure was before Congress in one form or another for nearly twenty years before the enactment of the Judicial Code. Finally, in 1910, a joint committee of both houses, which had been working on the matter for some time, prepared a bill, and this bill was introduced in the Senate as Senate Bill 7031 in the Sixty-

first Congress and in the House as H. R. 23377. Sec. 29 in each bill was identical with Sec. 3 of the Act of 1875 down to the provision relating to actions quieting title to land, which was in another section. The bill passed the Senate in this form (Cong. Rec., vol. 46, p. 2140) without discussion.

The House of Representatives reached Sec. 29 of H. R. 23377 on December 14, 1910 (Cong. Rec., vol. 46, p. 319). The section was read in its original form, and then, upon motion of Mr. Moon, chairman of the special committee on Revision of the Judicial Code, the section was amended to correspond to the provisions of H. R. 23002, which had passed the House in April, 1910, but which never passed the Senate. As amended, Sec. 29 provided for a duly verified petition requiring "due notice" of petition and bond for removal, required the party removing to file a certified copy of the record within *twenty* days from filing his petition and to plead to the complaint within *twenty* days from filing the record in the Federal Court.

Then, after such amendment, Mr. Stanley of Kentucky moved to amend the section by striking out all of said section after the word "therein" in line 10 on page 24 of the bill as presented. This amendment would have stricken from the section the provision that it should be the duty of the State Court to accept the petition and bond and proceed no further in the suit, and the provisions for notice of filing petition and for pleading in the Federal Court within thirty days from filing the record, or practically all

the changes in the section, except the requirement for a verified petition and for filing record within twenty days.

The purpose of the amendment offered by Mr. Stanley and the intention of Congress in passing the section without amendment are shown clearly by the following debate (Cong. Rec., vol. 46, p. 320) :

“MR. STANLEY: ‘Mr. Speaker, in every case brought before a State Court, where the question of Federal jurisdiction is raised, that question can be settled in the State Court as well as in the Federal Court, as to whether or not the defendant has a right to removal. If the complainant and defendant are bona fide citizens of different States, or if for any other reason the defendant is entitled to a removal, that question can be adjudicated in the State Courts. If the State Court is guilty of any error, that question can be reviewed in the Supreme Court of the State. If there is an error there, an appeal lies from the finding of the Supreme Court of that State to the Supreme Court of the United States. The effect of this provision of the law is to allow the defendant to make any sort of an excuse he pleases, any kind of an objection to the jurisdiction of the State Court. He may make the flimsiest allegation in the world that there is a question of diverse citizenship, and then, *ipso facto*, he can take that case from the jurisdiction of the State Court to the jurisdiction of the Federal Court.

“ ‘He can bring the complainant and his witnesses hundreds of miles into a Federal Court to adjudicate that question, and if the complainant has not the means to stand the heavy expenses incident to litigation in a Federal Court, this very petition for a removal is a practical denial of justice. This question, whether or not diverse citizenship is involved, is a question that could and should be decided by the State Court, and if the party aggrieved is wronged by the decision, he has an abundant opportunity for appeal. I can not express too strongly my objection to the means here provided for delays of justice to complainants by bogus and fictitious transfers to Federal Courts.’

“MR. MOON of Pennsylvania: ‘Mr. Speaker, just a word. The adoption of an amendment of that kind would simply allow the defendant to file his petition in the District Court for the removal from the State Court, and thereby give the District Court jurisdiction and then permit the State Court to go on and try the case. It would be utterly absurd to permit both Courts to have jurisdiction. I hope the amendment will be voted down.’

“The question was taken; and on a division (demanded by Mr. Stanley) there were—ayes 21, noes 50.

“MR. STANLEY: ‘Mr. Speaker, I ask for the yeas and nays.’

“The yeas and nays were refused, 17 members, not a sufficient number, supporting the demand therefor.

“MR. STANLEY: ‘Mr. Speaker, I move to strike out the whole section.’ The Clerk read as follows:

“Amend by striking out Section 29.

“MR. STANLEY: ‘Mr. Speaker, the objection raised by the gentleman from Pennsylvania (Mr. Moon) is not, in my opinion, well founded. It is true that on first blush it appears that there is a serious delay in justice by allowing two Courts to proceed at the same time with the same case. But there is practically no denial of justice in this thing, and the way to remedy it is to have the appellant who wishes to go into the Federal Court wait for a decision of this question in the State Court, and not have the petitioner who brings the suit in the State Court taken arbitrarily into the Federal Court whether there is any Federal question involved in the case or not.

“ ‘In the practical operation of the law it works no detriment, because if the State Court takes jurisdiction and renders its judgment, the defendant can still proceed in the Federal Court; he can take his petition in there and he can have his question adjudicated; and if there is any error in the State Court, that question will always be remedied on appeal.’

“MR. MOON of Pennsylvania: ‘The gentleman will observe that he is not accomplishing the

object which he seeks to accomplish by striking out this section. This is only the method of procedure. Section 28 gives the power of the removal, and we have passed that section and have reached Section 29.'

"MR. STANLEY: 'I am aware of that, and I am moving to strike out Section 29.'

"MR. MOON of Pennsylvania: 'That only provides the method of procedure in taking the removal. Section 28 gives the right of transfer.'

"MR. STANLEY: 'I do not care to deprive them of the transfer if there is a question of diverse citizenship.'

"MR. MOON of Pennsylvania: 'It is only the method of transfer from one Court to the other. If you strike out this section, it leaves the right with no method of putting it into operation.'

"MR. STANLEY: 'Exactly, and I would rather have no method of transfer than to have a wrong. It is better to have no transfer at all made than to have transfers made that are absolutely bogus or fraudulent on their fact and made simply for the purpose of delay.'

"MR. MOON of Pennsylvania: 'Mr. Speaker, I want to say just one word, and that is that to strike out Section 29 would be—I want to characterize it mildly—absurd. The right and power is granted by the Constitution for Courts to exercise this jurisdiction. This law is passed only to carry out the constitutional right. Section 28 af-

firms the cases under the Constitution which may be transferred, and that section we have passed. Section 29 has reference only to the method of transfer. If you strike out Section 29, you leave the right to make the transfer, but no means of putting that transfer into execution. It would therefore be ridiculous, and I ask that the amendment be voted down.'

"The SPEAKER: 'The question is on the amendment offered by the gentleman from Kentucky.'

"The question was taken, and the amendment was lost."

It thus appears that Mr. Stanley wanted Sec. 29, as presented to the House, changed so that the State Court could retain jurisdiction of causes which were not removable and was objecting to the section as it stood, because it allowed defendants to deprive the State Court of jurisdiction even in cases that were not removable. It appears further that he wished to do this by striking out the provisions as to notice, as to pleading in the Federal Court, and the limitation of the old statute that the State Court should proceed no further. Both sides conceded that, under the section as it was then before the House, the State Court could not retain jurisdiction even where the case was *not* removable, and the whole controversy was whether this provision should be still further changed so that both Courts could have jurisdiction at the same time, or whether jurisdiction after notice

had been served and petition and bond had been filed should be in the Federal Court exclusively. The House, by a positive vote, rejected both amendments offered by Mr. Stanley, and thus put itself on record for the proposition that after the service of notice and of filing of petition and bond for removal, the jurisdiction of the State Court should cease.

The further history of this action in Congress is brief. When Senate Bill 7031 reached the House, the House bill was substituted for it and passed. A conference committee was then appointed and the reports of the conferees were made to both houses on March 2, 1911, and adopted. This conference report changed Section 29 to its present form by substituting written notice for due notice and allowing thirty days instead of twenty days for filing copy of the record and for pleading. There was no further debate as to Sec. 29, the statement made by the House conferees merely referring to the change made by the committee in the bill as it passed the House.

From this review of the decisions relating to the relative jurisdiction of the State and Federal Courts in cases in which removal was sought and of the legislative history of Sec. 29 of the Judicial Code, it appears that the rule announced in *Insurance Company v. Pechner*, *supra*, in 1877, to the effect that State Courts did not lose jurisdiction in cases which were ultimately held not to be removable, upon the filing of a petition and bond, has been changed by Sec. 29 of the Judicial Code, and that under the present statute, after the serving of written notice of peti-

tion and bond for removal and the filing of such petition and bond, the jurisdiction of the State Court absolutely ceases, although this jurisdiction may be restored subsequently by a remand from the Federal Court, or possibly without such remand, by the failure of the removing party to file his record within the thirty days limited by the statute.

It follows from the above discussion as to the effect of Sec. 29 of the Judicial Code, that the default entered by the Clerk of the District Court of Blaine County on Oct. 16, 1912 (Tr. p. 15), and the judgment entered thereon, were void, and the enforcement of such judgment in its entirety should be restrained as prayed for by appellant in its Bill. The Bill of Complaint in the present case shows that on the 7th of October, 1912, and before the time in which complainant was required to answer or plead to plaintiff's Complaint, a written notice was served upon their attorneys of record in said action and on October 8, 1912, and also within such time, the petition for removal, bond on removal and such written notice were filed with the Clerk of Blaine County; and on the 28th of October, 1912, a certified copy of the record was filed with the Clerk of the United States District Court for the proper district (Tr. pp. 14 and 15). It further appears that the amount claimed by these parties was far in excess of the jurisdictional amount for the Federal Court, and that complainant sought the removal of said cause in good faith. (Tr. p. 23.)

Under these circumstances, the judgment obtained was void, and while the Federal Court might not

have jurisdiction to set it aside, nevertheless as appellees, Clara Mills and others, are seeking to put such judgment to an unconscionable use and to enforce a collection upon it of the full amount of their claims, its enforcement should be restrained in this action where all parties are before the Court and all the rights in the bond given by appellant as surety for the Bank Commissioner of the State of Idaho can be adjudicated.

It appears from the record that since appellees obtained their judgment in the State Court, a number of other claimants have made claims against the surety for more than the full amount of the penalty of the bond, and that such claimants were not parties to the suit brought by appellees, although they should have been parties thereto, for under the authorities hereinbefore cited appellees should have brought a suit in equity in behalf of themselves and all other depositors so that all claims against the surety could have been adjudicated and determined in one suit, not only as against the surety but as between the claimants themselves. Appellees having failed to bring such action and having, without notice to appellant or the knowledge of the Court, taken appellant's default while removal proceedings were pending, contrary to the provisions of Sec. 29 of The Judicial Code, and having declined to permit the vacation of such default upon any terms, and having collected dividends of which there has been no adjudication, credit or allowance by the Court, and it appearing that the enforcement of the judgment so obtained

must result in irreparable injury to appellant in compelling it to pay an amount largely in excess of the penalty of its bond or else result in an injury to a large number of other claimants who must be content with less than their pro rata part of the penalty of such bond, we respectfully submit that a preliminary injunction should have been granted as prayed for.

Respectfully submitted,

RICHARDS & HAGA and
McKEEN F. MORROW,

Solicitors for Appellant,
Residence: Boise, Idaho.

United States
Circuit Court of Appeals
For the Ninth Circuit

AMERICAN SURETY COMPANY OF NEW
YORK, a Corporation,

Appellant,

VS.

CLARA MILLS, GEORGE F. STEELE, Insurance
Commissioner of the State of Idaho, et al.,

Appellees.

Brief of Appellees, Mills and Associates

*Upon Appeal from the United States District Court
for the District of Idaho, Southern Division.*

W. E. SULLIVAN and
L. L. SULLIVAN,

Solicitors for Appellees.

Residence: Boise, Idaho.

No. 2699.

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STATEMENT OF THE CASE.

The statement of the case made by appellant is in the main correct. We therefore adopt the same, except those portions which are argumentative and those portions which are mere conclusions of the appellant as to certain parts of the pleadings and orders of the lower court.

We, however, wish to add thereto a further statement of matters which are not set forth in the appellant's statement.

The appellees, appearing upon this appeal, filed two motions to dismiss the Bill of Complaint herein upon several grounds, both motions being upon the same grounds. (Rec. pp. 56-60.) These motions were both denied. The decision of the court on the motion to dismiss treats of two matters:

1. Jurisdiction.
2. Injunctive relief.

On the question of jurisdiction the court held that it had a right to proceed as to certain relief prayed for in the complaint. In other words, that there was such a community of interest between all defendants that the penal sum of the bond might properly be considered as the matter in dispute or that the claims could be divided into three groups and aggregated in determining the question of jurisdictional amount, and that the court would therefore proceed on the theory that it could compel the defendants to prorate, provided the total number of valid claims or judgments exceeded the penalty of the bond. (Rec. pp. 64-69.)

On the question of injunctive relief the court held that it should go no further than to afford protection to the plaintiff against the necessity of paying in excess of the penalty of the bond, and therefore ordered that an injunctive order issue against the plaintiffs in the Mills suit, appellees herein, restraining them from collecting more of the penalty of the

bond than would be their proportionate share thereof, assuming that all claims were correctly scheduled in the Bill of Complaint and were valid. (Rec. pp. 69-71.) The court then further ordered:

“Counsel for the plaintiff may make the necessary computations, and submit the form of the order to opposing counsel.” (Rec., 71.)

Counsel for the Surety Company, plaintiff below, thereupon computed what the proportionate share of Mills et al. would be and submitted the figures to their counsel who approved the same, and the proportionate share was thus agreed upon as \$13,614.00. The court thereupon accepted said amount as the proper proportionate share of Mills et al. and entered the orders appealed from herein, restraining Mills et al. from collecting that portion of their judgment which would be in excess of their said proportionate share. (Rec., 72-75.) These orders were entered on October 9th, and October 15th, 1915. Thereupon, on October 14th, 1915, Mills et al. caused execution to be issued from the state court, wherein their judgment had been obtained, for their said proportionate share. On or about October 30th, 1915, and prior to a sale under said execution, said Surety Company, plaintiff below, filed its petition for appeal herein and therein requested the court to stay the enforcement of the Mills et al. judgment for the collection of the said proportionate share pending this appeal and to restrain Mills et al. from proceeding further with their sale on said execution. (Rec., 84-85.)

Said request to stay and enjoin, as aforesaid, was

supported by an affidavit of one of the counsel for appellant, which recites in full the facts as to the issue of said execution and the proceedings for a sale thereon and also recites that Mills et al. were proceeding to enforce their said proportionate share of said judgment,

“ * * * * without accounting for the dividends to the amount of several thousand dollars received by them since the entry of said judgment from the receiver of the Idaho State Bank at Hailey, Idaho, on the identical claims on which said judgment was recovered against the said American Surety Company of New York, plaintiff herein.” (Rec., 90.)

The question of dividends thus raised was met by an affidavit of one of counsel for Mills et al. showing the dates and amounts of the dividends received and that said judgment of Mills et al. had been satisfied of record to an amount of said dividends. Said affidavit recites as follows:

“That the Receiver of the Idaho State Bank paid the following dividends to all of the depositors of said bank, including Mills et al., Dithmer et al., and William Leonard, to-wit:

On May 25, 1913.....	10%
On December 19, 1913.....	5%
On September 24, 1914.....	3%
	<hr/>
Total	18%

“That on the 14th day of October, 1915, a partial satisfaction of said judgment was duly made and endorsed on the margin of the Judgment Docket for said District Court of Blaine County

for the above dividends of 18%, amounting to \$3,420.75; that said dividends are the only payments that have been made upon said judgment, and the only dividends that have been paid up to the date hereof by said Receiver." (Rec., 94.)

Thereupon a hearing was had by the court on said petition for appeal and requests for said stay and restraining order pending appeal, supported by said affidavits, and an order was then entered by said court allowing the appeal and restraining Mills et al. from proceeding further to collect said proportionate share pending the appeal herein, but said stay and restraining order pending the appeal being discretionary with said lower court, it further provided that it would only enter an order staying said execution pending the appeal, upon certain conditions, such as a larger rate of interest and a small attorney's fee for the hearings before it on the stay matter and not as attorneys' fee on appeal, to be paid in case the appellant was not successful on its appeal. (Rec., 87-89.)

It will be noted that in the order allowing the appeal and setting forth the conditions upon which a stay would be granted pending an appeal, that the lower court accepted as a fact that the amount of the dividends which had been received and credited on the judgment was \$3,420.75. (Rec., 88.) So this practically disposes of the false alarm which appellant seems to be laboring under that Mills et al. are going to endeavor to collect the full amount of their judgment without giving credit for the dividends.

Said conditions were met by appellant and a bond given conditioned as provided by the order of the lower court, and thereupon the appeal herein perfected from the two interlocutory orders and the decision of September 2nd, 1915, wherein the full injunctive relief prayed for was denied.

The appellant in its statement of the case does not clearly show what was alleged in the Bill of Complaint as to the Surety Company moving to set aside the default and the default judgment entered in the Mills case in the state court. The complaint clearly alleges that a default and default judgment were entered in the state court in the Mills action and seeks to explain wherein the default was wrongfully entered while the defendant was attempting to remove the action to the federal court, and then shows that an application was made to the state court to set aside the default which was contested by counsel for the plaintiff and that the court refused to set aside the default. (Rec., 23-24.) An appeal was thereupon taken by the Surety Company to the Supreme Court of the State in the Mills et al. action wherein one of the errors assigned was that the lower court had erred in refusing to set aside said default. The Supreme Court in its decision sustained the lower court and held that the lower court had properly refused to set aside the default and default judgment. While the appeal to the Supreme Court and its decision is not mentioned in the Complaint, it is referred to in appellant's brief herein and the decision cited, *State ex rel. Mills et al. v. American Surety Company*, 26 Idaho 652.

The appeal herein purports to be from the decision of September 2nd, 1915, and the orders of Oct. 9th and Oct. 14th, 1915. Said decision was the Court's decision on appellees' motion to dismiss, and of course is not an appealable decision, but can only be reviewed by an appeal from the final judgment. But we presume the appeal was made to include this decision as it held that plaintiff below was not entitled to the full injunctive relief asked, and thereupon directed counsel for plaintiff to prepare the proper order, which is the order of October 9th. As we view it, the only proper appeal, and the only one this Court will consider, is from the orders of Oct. 9th and 14th.

AS TO ASSIGNMENT OF ERRORS.

Upon an examination of the assignment of errors as set forth in the brief of appellant, we find that they are not the same as the assignment of errors filed with the petition for appeal. (Rec., 78-82.) The assignment of errors in the brief has been enlarged upon and covers matters not set forth in the errors originally assigned. In this respect we call the Court's attention to errors 2, 3, 6 and 7 as set forth in the brief.

We call the Court's particular attention to error 7 as to the lower court imposing unreasonable burdens upon the appellant as a condition for supersedeas pending the appeal. This is an entirely new error. The appellant herein is appealing from the decision of September 2, 1915, and the orders of October 9 and 14, 1915. Said decision, or the orders appealed

from, do not treat of this matter in any way. The order which provides the conditions for the allowance of a supersedeas is an entirely separate order, entered at a later date, on October 30, 1915. There was no appeal taken from this order. So we hardly believe that this Court will permit appellant to assign a new error, for the first time in its brief on this appeal, which could be only reviewed by an appeal from another order.

POINTS AND AUTHORITIES.

I.

“Equity will refuse to act by injunction when the grounds alleged have already been considered and held insufficient on a motion at law; in such case the whole matter is *res judicata* and equity will not re-open it.”

I Black on Judgments, Sec. 362.

23 Cyc. 1017.

I Whitehouse Eq. Prac., § 152, Note 59c.

I High on Irrig., § 226.

U. S. v. Anderson, 169 Fed. 205.

Wilson v. Buchanan, 170 Pa. 14.

Matson v. Field, 10 Mo. 100.

Davis v. Bass, 4 Ind. 313.

Collins v. Butler, 14 Cal. 223.

Critchfield v. Porter, 3 Ohio 518.

Gray v. Barton, 28 N. W. 813.

Dalhoff v. Keenan, 24 N. W. 273.

Fulliam v. Drake, 75 N. W. 479.

Telford v. Brinkerhoff, 163 Ill. 439.

Hoffman v. Burris, 71 N. E. 584.

Hartness v. Brown, 59 Pac. 490.

II.

The federal decisions, since the adoption of the Judicial Code, in construing that part of Sec. 29 requiring the giving of written notice to the adverse party of the filing of the petition on removal, hold that such amendment has created no radical change and was merely intended to give prompt notice to the adverse party that a transfer was being taken; some of the authorities even holding that the purpose is to give the adverse party an opportunity to appear in the state court and contest the removal.

Goins v. So. Pac. Co., 198 Fed. 432.

Hansford v. S.-O.-W. Co., 201 Fed. 187.

In re Kramer, 209 Fed. 627.

Potter v. G. B. Co., 213 Fed. 698.

Cropsey v. S. P. & P. A., 215 Fed. 132.

2 Foster's Fed. Practice, p. 1829, note.

III.

The State Court is not bound to surrender its jurisdiction on the filing of a petition and bond for removal unless the petition in connection with the pleadings shows that the petitioner has a right to the transfer, and until such showing is made, the State Court is not prohibited from proceeding further in the suit.

P. Ins. Co. v. Pechner, 95 U. S. 183.

Armory v. Armory, 95 U. S. 227.

N. O. Ry. Co. v. Miss., 102 U. S. 135.

Nat. S. Co. v. Tugman, 106 U. S. 118.

Gregory v. Hartley, 113 U. S. 742.

Stone v. State of S. C., 117 U. S. 434.

B. Ry. Co. v. Dunn, 122 U. S. 513.

Crehore v. O. M. R. Co., 131 U. S. 240.
Penn. Co. v. Bender, 148 U. S. 255.
C. & O. R. Co. v. McCabe, 213 U. S. 207.
Brown v. Nelsin & Co., 43 Fed. 616.
Springer v. Howes, 69 Fed. 850.
Monroe v. Williamson, 81 Fed. 984.
Dalton v. M. M. I. Co., 118 Fed. 881.
Donovan v. W. F. & Co., 169 Fed. 363.
Phillips v. W. T. C. Co., 174 Fed. 873.
Mannington v. H. V. Ry. Co., 183 Fed. 133.
Stevenson v. I. C. R. Co., 192 Fed. 956.

ENCYCLOPEDIAS AND TEXT BOOKS.

Dillon's Removal of Causes, Sec. 139.
Faust on Federal Procedure, 579.
Moon's Removal on Causes, Sec. 177.
2 Foster's Fed. Prac., Sec. 391.
10 Ency. of U. S. Sup. Ct. Reps., 704-5.
18 Ency. P. & P., 388, 351.
34 Cyc., 1305, 1308.
A Federal Equity Suit (Simpkins), 806.

IDAHO CASES.

Finney v. Am. Bonding Co., 13 Ida. 534.
Mills v. Am. Bonding Co., 13 Ida. 556.
Morbeck v. Bradford-Kennedy Co., 19 Ida. 83.
State ex rel. Mills v. Am. Sur. Co., 26 Ida. 652.
State v. T. G. & S. Co., 27 Ida. 752.

IV.

Since the adoption of the Judicial Code, the courts have held as before, to-wit:

"If, on the face of the record, including the petition for removal of a cause, the suit does not appear to be a removable one, the state court is not

bound to surrender jurisdiction, but may proceed as if no application for removal had been made."

M., K. & T. Ry. Co. v. Chappell, 206 Fed. 688.

C. of M. v. Postal T. C. Co., 218 Fed. 471.

Miller v. Soule, 221 Fed. 493.

State I. D. Co. v. Leininger, 226 Fed. 884.

Cropsey v. S. P. & P. A., 215 Fed. 132.

Hansford v. S. etc. Co., 301 Fed. 185.

Loland v. N. W. S. Co., 209 Fed. 626.

St. John v. U. S. etc. Co., 213 Fed. 685.

Johnson v. Butte etc. Co., 213 Fed. 910.

I. C. R. Co. v. Bacon, 236 U. S. 304.

Goins v. So. P., 198 Fed. 434.

V.

Law courts have jurisdiction over suits brought under Secs. 295, 296, Idaho Revised Codes, and judgments at law are valid.

State v. T. G. & S. Co., 152 Pac. 189 (Ida.)

State ex rel. Mills v. Am. Sur. Co., 145 Pac. 1097 (Ida.)

Carozza v. Peo. Sur. Co., 131 N. Y. Supp. 448.

Alessandro v. Peo. Sur. Co., 127 N. Y. Supp. 572.

Musco v. United Sur. Co., 117 N. Y. Supp. 21.

U. S. v. Wells, 203 Fed. 146.

U. S. v. Am. Sur. Co., 110 Fed. 913.

VI.

A judgment obtained in the State Court before an equitable action is started in the Federal Court for a pro rating will not be considered invalid in the equity court and the claim, which has been merged in the judgment, will not have to be proved again. Pay-

ment on such judgment will be made to the extent of pro-rate amount.

U. S. v. Am. Sur. Co., 126 Fed. 811.

U. S. v. Am. Sur. Co., 110 Fed. 913.

Am. Sur. Co. v. Lawrenceville Cement Co.,
110 Fed. 717.

Ill. Sur. Co. v. Mattone, 122 N. Y. Supp. 928.

Cappadonna v. Ill. Sur. Co., 125 N. Y. Supp.
162.

Carson v. City etc. Sur. Co., 73 Atl. 425 (Pa.)

VII.

A judgment establishing the relation of creditor and debtor is conclusive against all parties.

Black on Judgments, § 605.

Freeman on Judgments, §§ 334-7.

Bigelow on Estoppel, 167-8.

Freeman on Executions, § 136.

Bump on Fraudulent Conveyances, 576-7.

Wait on Fraudulent Conveyances, § 270.

Bensimer v. Fell, 29 A. S. R. 774.

Weaver v. Haviland, 40 A. S. R. 631.

Alkire v. Richesin, 91 Fed. 76.

Ledoux v. Bank of Am., 48 N. Y. Supp. 771.

Moore v. Curry, 106 Ala. 284.

Hersey v. Benedict, 15 Hun. 282.

Sidensparker v. Sidensparker, 52 Me. 481.

Candee v. Lord, 2 N. Y. 269.

VIII.

Judgments which have been secured before proceedings in bankruptcy, receiverships, creditors' suits, and administration of estates, are conclusive in such proceedings.

Central T. Co. v. Charlotte etc. Co., 65 Fed.
262.

Collier on Bankruptcy, 861 (10th ed.).

Remington on Bankruptcy, §682.

In re Engle, 5 A. B. R. 373.

In re Pease, 4 A. B. R. 547.

ARGUMENT.

The Bill of Complaint herein is purely an original bill in equity. It brings into the Federal Court three groups of parties as defendants, which are plaintiffs in three separate actions at law, as follows:

1. The action of Mills et al. (about 54 others) vs. American Surety Company, brought in the State Court in Blaine County, Idaho, wherein judgment has been recovered.

2. The action of Dithmer et al. (about 14 others) vs. American Surety Company, now pending in the State Court in said Blaine County.

3. The action of Leonard vs. American Surety Company, now pending in the Federal Court in Idaho.

All of the above actions were brought against said Surety Company as surety on the official bond of a former Bank Commissioner of the State of Idaho, for his failure to faithfully discharge the duties of his said office.

The liability arose on August 31st, 1910. The actions were commenced as follows:

1. The Mills action on August 31st, 1912.
2. The Dithmer action on August 30th, 1913.
3. The Leonard action on August 30th, 1913.

In the Mills et al. action the said Surety Company, in due time, filed its petition and bond for removal to the Federal Court and gave written notice thereof. But it failed and refused to appear in said action by demurrer or otherwise within the time allowed by the statutes of Idaho. Default of said Surety Company for failure to appear was duly entered. The Federal Court, upon motion of plaintiffs, remanded said action to the State Court. Said Surety Company then made its application to set aside said default on the ground of accident and mistake; counsel claiming that under § 29 of the Judicial Code the defendant was not required to appear in the State Court until after the action was remanded.

The said application was opposed by said Mills et al. and after a hearing thereof denied by said State Court. Said Mills et al. offered their proof and judgment was duly entered in their favor on May 20th, 1913, which was several months prior to the commencement of the Leonard and Dithmer et al. actions.

The complaint herein, filed on May 6, 1915, is for the purpose of restraining the enforcement of the said judgment of Mills et al., until the other two actions have gone to judgment, and then have an accounting between all parties, provided the judgments exceed the sum of \$50,000, the penal sum of the bond, and determine the pro rata share of each.

The Bill of Complaint attempts to give the Federal Court jurisdiction, upon two grounds, as follows:

1. Accident and mistake in the entry of said default in the Mills et al. action; counsel here

claiming the same as they claimed in the State Court that under § 29 of the Judicial Code the defendant was not required to appear in the State Court until after the action was remanded.

2. Equitable pro-rating, provided judgments, after a final determination thereof in the pending actions, exceed penal sum of bond.

POINTS RAISED IN APPELLANT'S BRIEF.

The argument of appellant is set forth under three headings which may be briefly stated as follows:

1. That courts of equity will enjoin the enforcement of unconscionable judgments.

2. That compliance with § 29 Jud. Code terminates the jurisdiction of the State Court until case is remanded.

3. That the Federal Court has jurisdiction to require a pro-rating.

a. That a surety who then pays any claimant more than his pro-rate share does so at its peril.

b. That then each claimant is entitled to be heard on the amount and validity of other claims.

We will discuss the above in their order.

AS TO COURTS OF EQUITY ENJOINING THE ENFORCEMENT OF UNCONSCIONABLE JUDGMENTS.

We conclude from the short paragraph only in appellant's brief on this point, without the citation of any authorities whatever, that it does not believe that there is any merit whatever in its contention.

We desire to have it understood that we accept the well established law that a Federal Court has juris-

diction over an independent equitable action to afford relief against a judgment at law of a State Court obtained by fraud, accident or mistake, where extrinsic evidence is required to show such fraud, accident or mistake. There are many federal cases recognizing such jurisdiction of a Federal Court, and in fact, such actions have been so litigated that the essential elements necessary to sustain such jurisdiction have become settled and universally recognized. These essential elements may be classed as follows: (1) Federal jurisdiction; (2) an equitable ground, as fraud, accident or mistake; (3) no adequate remedy at law; (4) meritorious defense; (5) laches. We could cite many authorities holding that these elements must all exist in such an action, but we do not deem it necessary as this Court has passed upon cases of this kind in several instances. One of the essential elements which alone will defeat the action herein on the ground of mistake, is that the Complaint on its face shows not only that the party had an adequate remedy at law but that he pursued the same.

The Complaint herein attempts to set up two equitable grounds upon which a Federal Court would grant relief against the enforcement of a judgment at law, as follows:

1. That a pro-rating is necessary.
2. Mistake in allowing a default judgment to be taken.

The lower court, in the action at bar, held that it had jurisdiction on the theory of equitable pro-rating, but that it did not have jurisdiction on the

ground of mistake wherein the default judgment had been entered in the State Court. In passing on the question of the complaint being sufficient in seeking to attack the validity of the judgment obtained in the State Court on the ground of mistake, said court disposes of this phase of the question in brief order, as follows:

“At the close of the oral argument I intimated the view, which I still entertain, that the plaintiff cannot in this proceeding attack the validity of the judgment obtained in the State Court by Mills and her associates. No actionable fraud is pleaded, and if it were assumed that the State Courts committed error in entering judgment by default before the motion to remand had been disposed of in this court, such error cannot be corrected in a suit of this character. There must be an end of litigation, and the only remedy available to the plaintiff is such as is afforded by appellate proceedings. I therefore put this branch of the Bill of Complaint on one side as in no wise tending to support our jurisdiction.”

We believe that the court was correct in its conclusion that such a contention of appellants was without any merit, and that it would waste no time upon the same. The allegations in the complaint are to the effect that in the Mills action in the State Court a judgment by default was entered; that appellant claims it was wrongfully entered through accident and mistake; that said default was entered while it was proceeding under § 29 of the Judicial Code to remove the action to the Federal Court; that it was

not necessary for it to plead in the State Court, within the time required by the law of the state, even in a case that was not removable, while defendant was attempting to remove the cause; that the clerk had no right to enter the default, even after the statutory time of the state law to plead had expired, until action was remanded; that an application was made by the defendant in the State Court to have said default set aside on said grounds; that counsel for appellant contested said application and that then the State Court refused to set aside said default.

Under such allegations in the Bill it is hardly surprising that the lower court at once came to the conclusion that the Surety Company, plaintiff herein, had an adequate remedy at law and pursued the same, and that if it desired to contest the matter further it should have been by appeal to the Supreme Court of the State. While the Complaint does not allege the further facts at the time the Bill herein was filed, an appeal had been taken to the Supreme Court of the State on these very questions of the default being entered by mistake and the construction of § 29 of the Judicial Code, etc., and had been heard and decided by said Supreme Court, such are the facts as is shown by the decision of the Idaho Supreme Court, cited by appellant in its brief, *State ex rel. Mills v. American Surety Company*, 26 Idaho 652. And if this court cares to examine said case, it shows how fully that court went into these matters and decided the same. And we might also add that said Surety Company then obtained a writ of error

to the Supreme Court of the United States to the Supreme Court of the State, and the same is now pending before that Court, and the assignment of errors covers the same questions that appellant now seeks to raise before this court as to the entry of the default and the construction of § 29 of the Judicial Code.

So far as the matters of the default and the construction of said § 29 being *res adjudicata* are involved herein, it makes no difference whether the said Surety Company appealed to the Supreme Court of the State or whether it then obtained a writ of error from the Supreme Court of the United States. The law is well settled that if the party had an adequate remedy at law and pursued the same in the State Court, he then has had his day in court and he cannot then ask for relief in any other court upon the same ground. If he makes an application to set aside the default upon said grounds and then does not appeal to the Supreme Court of the State, then of course the judgment of the District Court is final and conclusive; again, if he desires to appeal and does so, and the Supreme Court sustains the District Court, then that judgment of the Supreme Court becomes final and conclusive, unless an appeal is then taken to the Supreme Court of the United States. In other words, it makes no difference, after one pursues his remedy at law, where he stops or what appeals he takes. And so in the case at bar the complaint on its face showing that a motion was made to vacate the default in the District Court upon the same grounds as are set

forth in the complaint herein, makes these matters *res judicata* and conclusive.

A party is entitled to his day in Court in attacking the validity of a judgment. He can attack it in the same action at the time of the trial, by motion, or by appeal, or he can attack it in a separate action to vacate, provided he lost his remedy at law by no fault of his own; but when he has done this in either case, he is bound by the final determination of his action. He cannot again attack its invalidity and have it tried over again in some other court. He can have his day in court to attack the judgment as being invalid, but when this has been done, the judgment is final and the same issues cannot again be tried, but are *res adjudicata*.

The Surety Company attacked the invalidity of the entry of default on certain grounds in a State Court which had concurrent jurisdiction with the Federal Court of such matters and therefore it is bound by the decision of the State Courts. Never again can it attack the invalidity of said entry on the same grounds in any other court.

We admit the rule of law that the validity of a default judgment can be questioned, but we do not admit that it can be questioned a dozen times, or tried until determined in favor of the attacking party.

Courts will not re-examine questions of the validity of a judgment rendered by another court for purpose of determining whether the decision was correct, either according to the principles of law or those of equity. If the court had jurisdiction of the subject

matter and person, the party has had his day in court and he must correct the error on appeal or the judgment will stand against him. It is the duty of a litigant to make every defense available and assert every right he has in the trial court and urge any correction he may desire on appeal. If he fails so to do, it is his own fault, and if he does raise them, they become final and another court cannot aid him at some future time on the matters formerly in issue.

We do not intend to burden this brief with many citations of authorities or quotations therefrom setting forth the rules as to *res adjudicata*. The cases are so numerous in holding that matters or issues which have been determined in the original action by a motion, or have been urged on appeal or by writ of error are conclusive and *res adjudicata*, that it would be imposing upon this court to cite all such cases for your consideration.

We will, however, give the universal rule as so well set forth in I Black on Judgments, Sec. 362, as follows:

“The liberal practice of the courts in granting new trials and entertaining motions to vacate or open their own judgments, and the enactment of statutes in many of the states authorizing the setting aside of judgments taken against a defendant ‘through his mistake, inadvertence, surprise, or excusable neglect,’ have considerably abridged the province of equity in giving relief by injunction. And the rule is generally adhered to, as the more safe and conservative principle, that equity will not grant relief against an execution if the

party can equally well be relieved, on motion to open, vacate or modify the judgment, or to stay or quash the execution, in the court which issued the execution or has control of it. * * * * Equity will refuse to act by injunction when the grounds alleged have already been considered and held insufficient on a motion at law; in such case the whole matter *res judicata* and equity will not re-open it."

Among the numerous authorities supporting such rule are the following:

23 Cyc. 1017.

1 Whitehouse Eq. Prac. § 152, note 59c.

1 High on Irrig., § 226.

U. S. v. Anderson, 169 Fed. 205.

Hendrickson v. Bradley, 85 Fed. 508.

Wilson v. Buchanan, 170 Pa. 14.

Matson v. Field, 10 Mo. 100.

Davis v. Bass, 4 Ind. 313.

Collins v. Butler, 14 Cal. 223.

Critchfield v. Porter, 3 Ohio 518.

Gray v. Barton, 28 N. W. 813.

Dalhoff v. Keenan, 24 N. W. 273.

Fulliam v. Drake, 75 N. W. 479.

Telford v. Brinkerhoff, 163 Ill. 439.

Hoffman v. Burris, 71 N. E. 584.

Hartness v. Brown, 59 Pac. 490.

HAD A FURTHER ADEQUATE REMEDY AT LAW.

The Complaint shows said Surety Company tried its remedy at law and still had two others, an appeal to the Supreme Court, and a writ of error from the Supreme Court of the United States. If it be a fact that such appeals were not taken, then it must ac-

count for a failure to pursue such remedies. Under this principle of an adequate remedy at law in actions like the one at bar, we again find that the rules in relation thereto are so well settled as to warrant little or no controversy. If a remedy at law exists, it must be pursued. One may have several concurrent remedies at law, as a motion for a new trial, a motion to vacate in an original action, an appeal, writ of error, writ of review, etc. The best rule as sustained by a great weight of authority is that the party must first exhaust all his remedies at law. So the first question to determine is: Has time for remedy at law expired? If the time for prosecuting his remedy at law has expired, then the next question is: Why? If by his own or counsel's fault, neglect, inattention, mistake in law, etc., then equity will not grant relief. And so it is necessary in actions of this kind, to restrain the enforcement of the judgments of a State Court, for the plaintiff to allege and show that he had no remedy at law, or, if he had one, he lost same through no fault or neglect of his own. The allegations in the complaint show that the same questions as to the default judgment were raised in the original action, and the failure to show whether such remedy was further pursued, or, if it was lost, that it was not through the fault or neglect of said Surety Company or his counsel, leaves the said judgment final and conclusive.

UPON THE FILING OF A PETITION AND BOND FOR REMOVAL
DOES §29 OF THE JUDICIAL CODE TERMINATE THE JURIS-
DICTION OF THE STATE COURT IN AN ACTION WHICH IS
NOT REMOVABLE?

Appellant has sought to convince several different courts at different times in the Mills actions that § 29 of the new Judicial Code has brought about a most wonderful change in procedure for removals. It contends that it should be construed so as to overrule the unanimous line of federal authorities which have established the law as to when State Courts can proceed on removal proceedings and when not. All the courts to which such a contention has been presented have held that there was nothing whatever in such a contention, and without hesitation followed the plain wording of said Section 29. And as this very question of the construction of said Section 29 is now pending before the Supreme Court of the United States on appeal from the very Mills et al. judgment which the appellant is attacking in the present action, it does not seem right that appellant should seek to take up the time of this Court on a decision of this question.

We most respectfully call the Court's attention to the fact that the complaint herein on its face shows that the very identical question in the Mills action itself, to-wit, the construction of said Section 29, was raised, heard and determined by the State Court. We therefore submit that all of our argument on the question of the entry of the default being *res judicata* is applicable here. And we sincerely urge that

it is not proper for another Court except on appeal to pass upon the same question as already passed upon by the State Court, and we believe that this Court will dispose of this question in brief order as was done by the lower court.

Appellant contends that the Judicial Code has so changed the former law on removals that a defendant can file a petition and bond on removal and give notice, either in a suit which is removable or which is not removable, and then the jurisdiction of the State Court ceases until the action is remanded, if it is one that is not removable. Appellant first quotes the old Section 3 and then the new Section 29, and then seeks to show that a most radical change is intended, but it fails to cite one single case to show that the law has been altered in any way in respect to the question which is now presented to this Court. It cites three decisions of the Supreme Court of the United States which were decided prior to 1873 and would have this Court believe that said decisions, touching upon the jurisdiction of State Courts on removal, would support a case which was not in fact removable. We have examined these three cases and find that in each instance they were cases where the cause was a removable one, and that when the matter was presented to a Federal Court it was so held. Therefore, in each instance the court properly held that the State Court could not proceed in a case that was removable after the filing of a proper petition and bond. The appellant then seeks to show this Court that in the case of *Phoenix Ins. Co. vs. Pechner*,

27 L. ed. 427, that the Supreme Court seemed to have a change of heart, and without any reason established a new rule that a State Court could proceed after the filing of a petition and bond in a case which was not removable. Appellant then admits that this case has been followed by many cases. We would go still further and say that it has been followed by every Federal Court and every federal decision and every text-writer treating on the question and also by all the encyclopedias and all the State Courts. Appellant's first error, therefore, arises when it seeks to show that the Supreme Court of the United States made any departure at any time, and if counsel would read the three decisions cited, in the light that those three actions were determined to be removable actions, then they would have a unanimous line of decisions on this question.

The amendments of 1887 and 1888 to the Judiciary Act of 1875 were intended to restrict and do restrict the right of removal from the State Courts. Section 1 of these amendatory acts defines the jurisdiction of the former Circuit Courts of the United States. Section 2 provides what causes may be removed from the State Courts to the Federal Courts. All cases are not removable. Therefore, to receive the protection of the federal statutes on the removal of causes, one must bring himself within the limitations and seek only to remove a cause that is removable, but appellant herein is seeking equal protection for an action that was not removable. This would be placing in a defendant's hands the power of extending his time

to plead or answer in State Court. It would be making his desire superior to the provisions of the state statute. Under such a procedure, if a defendant was not ready to plead or answer, he could file a petition which on the face thereof showed that the cause was not removable, and by such a petition stop the procedure in the State Court and force the plaintiff to proceed in the United States Court to have the cause remanded before defendant could be required to plead. Such a rule would render state statutes, on appearance and answer, of no force and effect.

The very wording of the U. S. statute on removal, Sec. 29 (New Judicial Code), similar to Sec. 3 of old statutes, prohibits in direct words the very thing that appellant herein contends for. The wording is as follows:

“Whenever any party ENTITLED TO REMOVE ANY SUIT mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State Court to the District Court of the United States, he may make and file a petition duly verified * * * for the removal of such suit into the District Court to be held in the district where such suit is pending, and shall make and file therewith a bond, etc. * * * It shall THEN be the duty of the State Court to accept said petition and bond and proceed no further in such suit.”

It is readily apparent that said section applies only to suits that are removable as the opening words, “WHENEVER ANY PARTY ENTITLED TO RE-

MOVE ANY SUIT” shows that the party must upon the face of his petition present such a showing as will bring him within the class of cases that are removable. If he cannot do this, the State Court is under no obligation to accept his petition and bond. The statute does not provide that “Whenever any party entitled to remove, or not entitled to remove any suit, etc.” If it did, then no matter what the petition showed, whether the suit was removable or whether it was not removable, the State Court would have to accept the same. But the statute only deals with those suits which a party is entitled to remove and then provides: “It shall THEN be the duty of the State Court to accept said petition and bond and proceed no further in such suit.” The words “It shall then be the duty, etc.,” plainly refer to the first line of said section, to-wit: “Whenever any party entitled to remove any suit, etc.” It is then (in a suit which the party is entitled to remove), and then only, that the State Court shall accept the petition and proceed no further in the suit, and if the petition fails to so show (that the suit is one which the party is entitled to remove), then the State Court need not accept the petition, but can proceed further in such suit. It is so apparent that this clause is only applicable to suits which a party is entitled to remove that it seems hardly possible for any one to make any other contention. To argue that a party can file any petition he may desire, even showing upon the face of the petition that the cause is not removable and by so doing prevent the State Court from proceeding any further

in such suit is beyond all reason and cannot be considered in a serious light.

Many of the cases, in treating of the effect of removal, state the rule as follows: "Upon filing the *required petition* and bond in a removable case the jurisdiction of the State Court comes to an end."

This is the true rule and requires the petition to show that there is a cause which the party is entitled to remove. Any other rule is a clear violation of the United States statutes on Removal of Causes.

In *Phoenix Ins. Co. vs. Pechner*, 95 U. S. 183, 24 L. ed. 427, the Court states as follows:

"This right of removal is statutory. Before a party can avail himself of it, he must show upon the record that his is a case which comes within the provisions of the statute. His petition for removal, when filed, becomes a part of the record in the cause. It should state facts, which, taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not, in law, shown to the court that it cannot 'proceed further with the cause.' Having once acquired jurisdiction, the court may proceed until it is judicially informed that its power over the cause has been suspended."

The following cases also touch directly on the clause in said § 29 as to the duty of State Court "*to proceed no further*" and in construing same hold that it is only applicable to a suit which a party is "entitled to remove:"

N. O. M. & T. R. R. Co. v. Miss., 102 U. S. 135,
26 L. ed. 96.

Stone v. S. Car., 117 U. S. 430, 29 L. ed. 962.
Crehore v. O. & M. R. Co., 131 U. S. 240, 33
L. ed. 145.

The amendments made in said Section 29 cover the following matters:

1. As to when record should be filed in the Federal Court.
2. As to service of written notice of the filing of petition and bond upon the adverse party.
3. As to the time to plead.

We will treat of the above in their order.

AS TO FILING RECORD IN FEDERAL COURT.

Section 3 of the old law provided that bond should be given conditioned that the party removing would enter a copy of the record in the Federal Court "on the first day of its then next session."

Section 29 of the Judicial Code provides for the entering of such record in the Federal Court, "within thirty days from the date of the filing such petition." It is readily seen that this amendment was to fix a definite period for the filing of a copy of the record in the Federal Court. Under the old law the first day of the next session might be within a few days of the filing of the petition and not give sufficient time for the preparation of a copy of the record, and again the first day of the next session of the Federal Court might not be until several months after the filing of the petition in the State Court. So it is quite evident that the intention of the amendment was to make certain that which theretofore had been uncertain in time.

AS TO SERVICE OF WRITTEN NOTICE ON ADVERSE PARTY.

The old law did not require that the adverse party should be notified in any way of the filing of the petition and bond. Generally the proceeding was *ex parte* and there was no statutory right to a hearing under the form of practice. The petition and bond would be presented to the State Court. It was the duty of the State Court to examine the same and determine therefrom whether or not, in its opinion, a sufficient petition and bond had been filed, and whether the petition showed that the party seeking to remove was entitled to have the suit removed. The court in many instances would refuse to order a removal as is shown from the numerous cases where the State Court refused to relinquish its jurisdiction but proceeded further in the case. In some instances the adverse party was advised of the filing of petition and bond for removal and would be given a hearing, and the State Court then refuse to order a removal, but proceeded further in the action. As we understand the former removal statute, no order was necessary by the State Court either ordering or refusing removal. It did not effect the right of the defendant to proceed and file a copy of his record in the Federal Court and have that court pass upon his petition. But the State Court, if of its own motion or with the assistance of counsel for the adverse party, became satisfied that the action was not removable or that the petition and bond were insufficient, would then refuse to stay the proceedings in the State Court and proceed to trial. There seems to be some conflict

between the federal authorities as to just what was the intention and purpose of said Section 29 requiring written notice to be given the adverse party. The question arises: Does such provision contemplate a hearing, and is the notice required so that the adverse party could appear and contest the removal? Some of the decisions so hold, while others hold that it was doubtless the purpose of the amendment to give the adverse party prompt notice of the exercise of the right of removal, and that it was not clear that the provision had any other purpose.

In *Goins vs. Southern Pac. Co.*, 198 Fed. 432, in passing upon the purpose of the requirement under Sec. 29 of preliminary notice, the Court states:

“Without the effect of materially changing the method of procedure, it will tend to protect the parties and the courts as well, not alone against mistakes and delays in proceedings genuinely instituted, but against unwarranted and frivolous attempts to exercise the privilege in instances where no real right exists. And, speaking in a general way, I entertain little doubt that it was for reasons such as indicated in the class of cases referred to that the requirement of notice has been prescribed.”

In *Hansford v. Stone-Ordean-Wells Co.*, 201 Fed. 187, it is held:

“Whatever the purpose of notice, the removal act seems to require no more. The statutory notice would seem calculated to serve no purpose but to advise the plaintiff that the suit and all future proceedings therein are about to be trans-

ferred to another tribunal, to submit to his scrutiny the sufficiency of the petition and bond, and to enable him to speed proceedings if the defendant delays therein."

In the case of *In Re Kramer*, 209 Fed. 627, it is held:

"This notice is a matter of substance; and, since the right of removal is statutory, all the requirements of the statute must be followed in order to effect the transfer. A prior written notice is therefore an essential step in the proceedings. The purpose of the statute is that the adverse party shall be advised of the intention to file such petition and bond in order that he may have an opportunity to appear in the State Court and resist the removal if he so desires."

In *Potter v. General Baking Co.*, 213 Fed. 698, it is held:

"It is contended that the purpose of the provision is that the adverse party shall be advised of the intention to file such a petition and bond, in order that he may have an opportunity to appear in the State Court and resist the removal, if he so desires. * * * * It was doubtless the purpose of the amendment to give the adverse party prompt notice of the exercise of the right of removal, and it does not seem clear that the provision had any other purpose."

In *Cropsey v. Sun Printing, etc., Ass'n*, 215 Fed. 132-3, it is held:

"The plaintiff does not disclose, and it is not apparent, what better purpose would have been

served, or what greater advantage she would have gained, had the notice stated the exact time when such petition and bond were to be filed. If, as suggested, the legislative purpose was to 'give the adverse party an opportunity to be heard as to whether the petition and bond were "requisite," ' that opportunity was as available to the plaintiff by the notice given as if the exact time when such petition and bond were to be filed had been stated. * * * * While the requirement of Jud. Code, § 29, for the service of notice of intent to file a removal petition and bond is mandatory and jurisdictional in a limited sense, *such requirement does not change the respective powers of the State and Federal Courts with reference to jurisdiction to ultimately determine the validity of removal proceedings.*"

In 2 Foster's Fed. Practice, p. 1829, note, it is stated:

"Previously to the Judicial Code, no notice to the plaintiff was required, this seems to give to plaintiff a right to a hearing in the State Court before the removal asked."

We believe the foregoing to be all of the authorities which have discussed, since the adoption of the Judicial Code, that part of said Sec. 29 relating to the giving of notice to the adverse party. These authorities show that some of the courts are of the opinion that the requirement has not changed the procedure in any material way, and that the purpose thereof is to advise the plaintiff that the suit and all further proceedings therein are about to be transferred to

the Federal Court; while other courts seem to be of the opinion that such an amendment was for the purpose of notifying the plaintiff of the removal and giving him an opportunity to appear in the State Court and resist the removal if he so desires. On the other hand, there are no authorities whatever which support the radical view of appellant herein that it was the intention of Congress, by the adoption of said Section 29, to prevent the State Court, upon the filing of a petition, sufficient or insufficient, or in an action removable or not removable, from refusing to proceed further in the action. The mere requirement that notice be given cannot be deemed, even under a strained construction, to have further changed the whole procedure on removals in regard to rights and duties of the State and Federal Courts respectively on removal proceedings, and now require that the State Court proceed no further, even where the petition is not sufficient and the action is not removable.

AS TO TIME TO PLEAD.

The defendant contends that the mere filing of a petition for removal will oust the State Court of, or at least suspend, its jurisdiction and that the defendant is not required to appear and answer in the State Court until after the question of removability is passed upon by the Federal Court. In other words, that a defendant can attempt to remove a case not removable and by the mere filing of a petition for removal stop the proceedings of the State Court and thereby extend its time to appear and answer although the

State Court refuses to enter an order for the removal.

We think there is no merit whatever in such a contention, for the reason that not a single case is cited in appellant's brief so holding, while on the other hand, the decisions are unanimous to the effect that the State Court cannot be deprived of its jurisdiction unless the petitioning party can allege such facts in his petition as will show on its face that the cause, which he is seeking to remove, comes within one of the classes enumerated in the federal statutes.

Part of said Sec. 29 of the New Federal Code provides:

"The said copy (certified copy of record), being entered within thirty days as aforesaid in said District Court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer or demur to the declaration or complaint in said cause."

This provides simply for the appearance of a defendant in the U. S. District Court in a removable suit, and the demurrer or answer is filed in that Court. If the cause is remanded, the demurrer does not go back to the State Court and, therefore, in such a case, a demurrer or appearance must have been filed in the State Court within the time required by the state law.

The contention of counsel for appellant, that Congress intended, by the new Code, to provide an orderly procedure until the question of jurisdiction could be determined, is of no force whatever, as the ques-

tion of jurisdiction, prior to and since the new Code, could and can be determined in an orderly procedure. All the defendant has to do is to file a demurrer in the State Court with his petition for removal, then he is protected from a default, and he waives no rights whatever, and he can then proceed and have the question of jurisdiction passed upon in the proper way. A requirement of the defendant that he respect the state laws in a case which is not removable, will not have the effect claimed by appellant, of fostering unseemly conflicts.

What argument is there in favor of permitting the federal law to control the appearance of a defendant in a State Court, if the Federal Court does not have jurisdiction of the action?

That part of Section 29 of the Judicial Code, as to appearance within thirty days in the U. S. District Court, does not, and was not, intended to make the change contended for by appellant. No change is made, except to make the time certain when the defendant should appear in the U. S. Court *in an action which was removable*, instead of leaving it uncertain, as was the case under the old law, where it was left to the practice in the different districts, where various rules were adopted, such as at the time of the filing of the petition, or making the time begin to run from the filing of the record in the U. S. Court, or giving the balance of the time after the record is filed.

The "unseemly conflicts," referred to by appellant, between the State and Federal Courts over the trial

of cases, would not be, and is not, eradicated by fixing a definite time to appear in the U. S. Court. The State Court can still refuse to relinquish its jurisdiction just the same, and proceed to trial, in an action which it believes is not removable, prior to the acceptance of jurisdiction by the Federal Court, regardless of the definite time to appear, as provided in the New Judicial Code.

It is a strange doctrine indeed to advocate, that a Federal Court, without jurisdiction, can stop a lawful procedure of a State Court, which has jurisdiction, and thus virtually set aside a state law as to time of appearance, and extend the time an indefinite period. A defendant could then refuse to pay any attention to a state statute on appearance, and if he wished more time than the 20 to 40 days allowed, and wanted to delay the action, all he would have to do would be to file a petition for removal, and the action would be in abeyance in the State Court, even if the necessary jurisdictional amount or diversity of citizenship did not appear.

If an action is removable, then it makes no difference whether the State Court orders the removal or whether it does not. If it signs an order, then of course, there can be no further proceeding in the State Court. The plaintiff must then move to remand. And if the Federal Court holds the case is removable, it must then go to trial in that Court. If, however, the Court refuses to enter an order for removal and proceeds in the trial of the action, then the defendant can, nevertheless, file his record in the

Federal Court and have the Federal Court pass upon the question of removability. If the Federal Court holds that the action is removable, then all the proceedings in the State Court, after the date of the filing of the petition, would be void. In such a case the rights of the defendant would not be affected, even if he had failed to appear by demurrer or otherwise in the State Court. It would be sufficient for him to make his appearance in the Federal Court within 30 days after the filing of the record in the Federal Court.

Now, if the defendant seeks to remove an action which is not removable, it may be that the State Court will sign an order of removal. Then the plaintiff must move to remand.

Again, the State Court may, upon an examination of the petition, deem the same insufficient, or be of the opinion that the action is not removable, and refuse to relinquish its jurisdiction.

We now are considering the particular class applicable to the question before this Court. The action was not removable and this point is not open to argument for the reason that both the State Court and the Federal Court have held that the same was not removable. Such being the case, what were the rights of the plaintiff and the defendant in said Mills action in the State Court? The plaintiffs brought an action which could only be tried in the State Court. They were entitled to have their action governed and tried by the state laws. This could only mean that the defendant Surety Company must have appeared and

answered within forty days after being served with summons. The Surety Company did not do this, however, and instead of filing a demurrer with its petition for removal, as is usual and customary, it sought to transfer a cause into the Federal Court which was not removable. The real question then is: Could the defendant, by such a mistake, secure months of additional time by litigation over motions to remand and motions to set aside the default, and then ask the court to excuse it and set aside the proceedings which were legally had in the State Court? We contend, under such circumstances, that there is no question as to the validity of the proceedings of a State Court after it has refused to relinquish its jurisdiction of an action which is not removable, and further, that the authorities fully sustain this proposition.

If we are right in our contention, then the Mills action in the State Court was not a removable one and the complaint and petition failed to show that the defendant was entitled to a removal of the cause. The matter was presented to the State Court and the Court held that the cause was one which could not be removed and an order was thereupon entered refusing to remove the same. The State Court, having concluded that the petition failed to show that the cause of action was removable, then had the right to proceed and even try the action, if it so desired, and unquestionably, under the universal law, all proceedings by the State Court are then valid. The only thing that could possibly defeat and nullify the proceedings in the State Court, after it refused to re-

linquish its jurisdiction, would be a contrary ruling by the United States District Court when the matter was presented to it. If that Court had refused to remand, then we would not contend that the proceedings in the State Court were valid. But where the Federal Court held that the cause was not removable, the same as the State Court, then the defendant was in error and could not ask to have any of the proceedings set aside that had been taken in the State Court. He must abide by the consequences of his wrongful act in seeking to remove said cause. There was no excuse for the defendant not protecting itself in the State Court as it is customary to file a demurrer and thus enter an appearance in the State Court at the time of filing the petition for removal and the United States cases are unanimous in holding that a defendant can thus proceed in the State Court and protect himself without waiving his right to have the question of jurisdiction and the removability of the cause passed upon by the Federal Court.

We will state the general rule and cite some of the leading cases decided prior to the adoption of the Judicial Code, to show the well established law under said Sec. 3 of the old law, and then follow same with a list of all of the authorities since the adoption of said Judicial Code, construing said Sec. 29, showing that there has been no change whatever in respect to the right of the State Court to proceed further in an action which is not removable.

The State Court is not bound to surrender its jurisdiction on the filing of a petition and bond for removal

unless the petition, in connection with the pleadings, shows that the petitioner has a right to the transfer, and until such showing is made, the State Court is not prohibited from proceeding further in the suit; and if the action is one which the party is not entitled to remove, the jurisdiction of the State Court is not ousted and its subsequent proceedings are valid.

P. Ins. Co. v. Pechner, 95 U. S. 183.

Amory v. Amory, 95 U. S. 227.

N. O. Ry. Co. v. Miss., 102 U. S. 135.

Nat. S. Co. v. Tugman, 106 U. S. 118.

Gregory v. Hartley, 113 U. S. 742.

Stone v. State of S. C., 117 U. S. 434.

B. Ry. Co. v. Dunn, 122 U. S. 513.

Crehore v. O. M. R. Co., 131 U. S. 240.

Penn. Co. v. Bender, 148 U. S. 255.

C. & O. R. Co. v. McCabe, 213 U. S. 207.

Brown v. Nelsin & Co., 43 Fed., 616.

Springer v. Howes, 69 Fed. 850.

Monroe v. Williamson, 81 Fed. 984.

Dalton v. M. M. I. Co., 118 Fed. 881.

Donovan v. W. F. & Co., 169 Fed., 363.

Phillips v. W. T. C. Co., 174 Fed. 873.

Mannington v. H. V. Ry. Co., 183 Fed. 133.

Stevenson v. I. C. R. Co., 192 Fed. 956.

ENCYCLOPEDIAS AND TEXT BOOKS.

Dillon's Removal of Causes, Sec. 139.

Faust on Federal Procedure, 579.

Moon's Removal of Causes, Sec. 177.

2 Foster's Fed. Prac., Sec. 391.

10 Ency. of U. S. Sup. Ct. Reps., 704-5.

18 Ency. P. & P., 388, 351.

34 Cyc., 1305, 1308.

A Federal Equity Suit (Simpkins), 806.

IDAHO CASES.

Finney v. Am. Bonding Co., 13 Ida. 534.

Mills v. Am. Bonding Co., 13 Ida. 556.

Morbeck v. Bradford-Kennedy Co., 19 Ida. 83.

State ex rel. Mills v. Am. Sur. Co., 26 Ida. 652.

State v. T. G. & S. Co., 27 Ida. 752.

As showing that there has been no change by said Sec. 29 of the new law, we will state that all of the Federal cases, passing upon the question of the State Court proceeding no further in the action, have put the same construction upon said section as was theretofore placed upon Sec. 3 of the old law.

The first case touching upon this point is Goins v. So. Pac. Co., 198 Fed. 434. The court in its decision refers to the accepted procedure under the old law as follows:

“And while the State Court was not bound to surrender its jurisdiction upon a record which on its face did not in its judgment disclose a case for removal, its refusal was at the peril of having its judgment set aside by the Supreme Court of the United States, should its ruling prove erroneous.”

It seems in that case that counsel for plaintiff took the position that said Sec. 29 intended to thereafter place the question of determining the jurisdiction on removal with the State Court and let that Court decide the question instead of the Federal Court. The Court stated emphatically that it was unable to assent to the contention that Congress intended to effect so radical a change, and then concluded that said section did not have the effect of materially changing

the former method of procedure, except by giving the plaintiff notice of the intended transfer. We might state that every case, since the adoption of the Judicial Code, passing upon this point, has followed the former decisions decided under the old section, and they are just as emphatic and use the same words in reciting the law as were used in the old decisions. We will content ourselves by grouping the authorities.

“If, on the face of the record, including the petition for removal of a cause, the suit does not appear to be a removable one, the State Court is not bound to surrender jurisdiction, but may proceed as if no application for removal had been made.”

M., K. & T. Ry. Co. v. Chappell, 206 Fed. 688.

C. of M. v. Postal T. C. Co., 218 Fed. 471.

Miller v. Soule, 221 Fed. 493.

State I. D. Co. v. Leininger, 226 Fed. 884.

Cropsey v. S. P. & P. A., 215 Fed. 132.

Hansford v. S. etc. Co., 301 Fed. 185.

Loland v. N. W. S. Co., 209 Fed. 626.

St. John v. U. S. etc. Co., 213 Fed. 685.

Johnson v. Butte etc. Co., 213 Fed. 910.

I. C. R. Co. v. Bacon, 236 U. S. 304.

Buxton v. P. L. Co., 211 Fed. 718.

Counsel for appellant seems to concede that up to the time of the adoption of the Judicial Code the rule had become well established that the State Court was not required to relinquish its jurisdiction upon the filing of a petition which did not show that the action was removable. The case of *C. & O. Ry. Co. v. Mc-*

Cabe, 213 U. S. 207, is cited for the purpose of showing that unless the State Court does relinquish in all instances, "unseemly conflicts" of jurisdiction will continue to arise. True, the Supreme Court states that in order to prevent unseemly conflicts of jurisdiction, it would seem that the State Court in such cases should withhold its further exercise of jurisdiction until the decision of the District Court of the United States is reviewed in the Supreme Court. Then the Court immediately adds:

"Conceding that, except for the principle of comity, the State Court may decide the question of jurisdiction for itself * * * * "

This clearly shows that the Supreme Court still recognized that in order to protect the rights of both parties on removal it would not be proper to absolutely deny the right of the State Court to proceed in an action which it thought was not removable. And so the rule on removal as it then stood must, in order to protect the rights of both the plaintiff and defendant, always be the law. The Court has two rights to deal with, to-wit:

1. The rights of plaintiff to proceed in the State Court if the action is not removable.
2. The rights of defendant to have a removal, if the action is removable, regardless of the decision of the State Court.

Now if the court adopts the theory advanced by appellant herein, then the rights of plaintiffs must suffer in many instances. A petition for removal which is entirely insufficient and in an action which

on its face is clearly not removable, could be made the means of staying the State Court until the plaintiff could obtain an order from the Federal Court remanding the cause. There are so many attempted removals in suits which are not removable, that it would be a great injustice to plaintiff to require the State Court to absolutely relinquish its jurisdiction until an order remanding the cause had been made by the Federal Court.

Again appellant argues that if a party is seeking in good faith to remove a cause it works a great hardship to compel him to litigate his rights in two forums at the same time. Likewise, it is a great hardship for the plaintiff to go to the Federal Court and contest removal proceedings in an action which on its face is not removable, and meanwhile have his action stayed in the State Court.

And so it is, in order to protect the rights of both parties, that the law should stand as now well established by the federal decisions. And there is nothing whatever in the changes made in said Section 29 to warrant such construction as appellant contends for.

As bearing upon the construction of said Sec. 29, the appellant has copied in its brief the debate that took place in Congress when said section was under consideration. It is quite instructive, but as we read the same, it fails to sustain the contention of appellant in any manner. The debate that arose was caused by an amendment offered by Mr. Stanley. The reason he gives in support of the amendment appears on page 70 of appellant's brief. Mr. Stanley was of

the belief that in "every case" on removal, the question of jurisdiction should be settled in the State Court. He argued that such question could as well be adjudicated in the State Court and then an appeal taken therefrom. He made no distinction between an action that was removable and one that was not removable. He thought that justice would be more likely to be had by allowing the State Court to pass upon the right of removal.

Mr. Moon answered such argument by stating that the adoption of such an amendment would permit the State Court to go on and try the case and still allow the Federal Court, upon the filing of the petition, to take jurisdiction, thus giving both courts jurisdiction. Mr. Moon's reply is found on page 71 of appellant's brief and shows clearly that such a condition would arise in all actions whether they were removable or not. He concluded by stating that such an amendment would be utterly absurd. And such it would be, if the amendment of Mr. Stanley had been adopted, and it would have allowed the State Court to refuse to relinquish jurisdiction even in an action which was not removable.

Mr. Stanley replied as is shown on page 72, and still further showed his intention in having his amendment cover both actions which were removable and which were not. His argument was that if the action was a removable one, that then the defendant would have his remedy by appeal.

After setting forth said debate, appellant, on page 74, comes to the conclusion that the Stanley amend-

ment was for the purpose of allowing the State Court to retain jurisdiction of causes which were not removable. Here is where appellant is in error, as nowhere in the discussion can such an inference be drawn. The trouble with the proposed amendment was that it covered all cases whether removable or not and would thus allow the State Court to proceed in an action although it was removable. Appellant then adds:

“Both sides conceded that, under the section as it was then before the House, the State Court could not retain jurisdiction even where the case was not removable.”

Again, we state that appellant is in error in arriving at such a conclusion, as nowhere in the debate does it appear that either side conceded that the State Court could not retain jurisdiction in an action which was not removable.

So it appears that appellant is without any support whatever on its construction of said Sec. 29. All of the federal and state decisions are against such construction, not only the decisions rendered prior to the Judicial Code, but all decisions rendered since. And we submit that the debate in Congress on said section in no way assists appellant in its argument that the intention was by the simple amendments of making definite which theretofore had been indefinite, and requiring notice, to so change all the established law on removals as to deny the State Court the right of proceeding in an action which was not removable.

AS TO QUESTION OF FEDERAL COURT HAVING JURISDICTION
TO REQUIRE A PRO-RATING.

Appellant takes up a great deal of space in its brief in an endeavor to show this court that in this class of cases the equitable theory of pro-rating should be required and that the Federal Court has jurisdiction in an action brought for such purpose.

It appears to us that the appellant is premature in seeking to sustain the lower court in retaining jurisdiction of the Bill on the theory of equitable pro-rating. This question was raised by our motions to dismiss, and is not involved in the present appeal.

Appellant should have confined its argument and brief to the matter which is now before this court, to-wit, an appeal from interlocutory orders refusing to grant the full injunctive relief prayed for. The plaintiff filed its Bill, to which certain defendants, the appearing appellees herein, filed motions to dismiss. Said motions to dismiss squarely raised the question of whether or not the Federal Court could take jurisdiction of the action herein and require a pro-rating. This question was argued pro and con to the lower court and it held that it had jurisdiction and denied the motions to dismiss. That ruling, of course, was against said defendants, appellees herein, but they are not now before this court raising the question that the lower court erred in holding that it had jurisdiction in the action herein. So this question of jurisdiction should be left for determination at the proper time, to-wit, upon an appeal, if one

be necessary, by said defendants after a trial upon the merits.

It seems that appellant, in its brief on an appeal from interlocutory orders of this kind, should not go into the question of the jurisdiction of the lower court on the theory of pro-rating, but should proceed along the line that the court had jurisdiction and then show that the court erred in not giving it the full injunctive relief prayed for. And then if counsel for appellees raised the question that the lower court had no jurisdiction in the action, they could meet same by reply brief. While it might be incumbent upon this court to determine whether or not the lower court had any jurisdiction in the action whatever for the purpose of passing upon the question of whether the lower court erred in giving any injunctive relief whatever, still, if appellees do not at this time raise the question, then for the purpose of this appeal this court should assume that the lower court had jurisdiction and determine the real question before it as to whether or not the appellant was entitled to the full injunctive relief asked. If this court, in looking over the Bill, came to the conclusion that the Federal Court had no jurisdiction whatever and that it would have to so decide when the matter was presented to it, then it would undoubtedly so hold at this time, which would be holding that the lower court erred in granting any injunctive relief whatever. But unless such want of jurisdiction clearly appears upon the face of the complaint, or unless counsel for the appellees raise the jurisdictional question and present

their argument and authorities on the question, then, as we understand the law, this court, on an appeal from such interlocutory orders as herein appealed from, will not go into the jurisdictional question.

In order that there may be no misunderstanding as to this jurisdictional question, we will state that it is not our intention to raise at this time the question of whether or not the lower court, in passing upon our motions to dismiss, erred in retaining jurisdiction in the action and holding that a pro-rating should be had. We still hold to the position that we took on our motions to dismiss, and will raise such question at the proper time, if we deem it necessary. But this question we will not now discuss nor present any authorities thereon. So if the appellant is willing to meet us on the direct questions raised on its appeal from the interlocutory orders, and without taking so much space and spending so much time on matters which are not properly involved on this appeal, the issues will be narrowed down and the time of this court will not be unnecessarily taken up in now considering such question.

Furthermore, if the question as to the right of the Federal Court to require a pro-rating is now raised, one of the real issues on this appeal is obscured. Once the court has come to the conclusion that the Mills judgment as obtained is a valid judgment against the Surety Company, the one question remaining is whether or not this judgment may be attacked by Leonard and Dithmer et al. The discussion of this question has been so intermixed and interwoven and

confused with the discussion of the right of the court to order a pro-rating that it is impossible to perceive where the argument on either is taken up or left off. The only apparent reason for such a mode of argument is that had appellant segregated its discussion and authorities on the point of validity of the judgment as against Leonard and Dithmer, there would have been no reasoning or decision to support the same.

**JUDGMENT OF MILLS ET AL. VALID AS TO LEONARD AND
DITHMER.**

This question has been put in issue for the first time by the argument of appellant in its brief herein. The complaint nowhere seeks to stay the Dithmer et al. and Leonard law actions and have the same tried in the equity action, on the theory that Mills et al. are interested parties and should be given a chance to contest their claims, nor does the complaint attempt to bring Mills et al. before the Federal Court with their judgment and give Dithmer et al. and Leonard a chance to contest the validity of the default judgment. The complaint merely contains a recital that Dithmer et al. and Leonard claim that they are not bound by the default judgment, but it leaves open the question of when, where or how they are to attack or to be given a chance to attack said default judgment if they have such right.

Judge Dietrich in rendering his decision must have had in mind the clear allegations of the complaint, and concluded that the complaint was not upon any

theory whereby the defendants would be given a chance in the present action to contest each other's claims or judgments; in other words, that so far as the present action is concerned, the judgments, when obtained, will be treated as a liquidation of the different claims, and will be treated as conclusive and binding between the three different groups. No other construction whatever could be placed upon the complaint. All of the arguments up to this time have been along this theory and in fact the Dithmer et al. and Leonard actions, since the filing of the complaint herein, have been proceeding in the different courts. And we believe that our contentions in this regard are borne out by the decision of Judge Dietrich, as in referring to the conclusiveness of the Mills judgment as to the several amounts in which the judgment claimants were damaged, he comes to the conclusion and so states that this is a point he does not decide. *The reason is that such question had not been raised by pleadings or arguments.* Is it fair to the lower court or counsel that this question be raised at this time and the true meaning of the decision be distorted because not interpreted in the light of facts? Then follows the other part of his order, showing in every way that the lower court is treating the complaint according to its clear intent, and that all that said court is interested in is the matter touching the distribution of the fund after all the actions have been tried in the pending law suits and judgments filed in said court. Then said court will have an accounting by taking the amounts of said judgments and deter-

mine what the pro-rate share of each group should be. In other words, the court is not interested in the question of a trial or contest between the different defendants or different groups of defendants as to the amounts of damages, but after they have been determined in the law actions, then said federal court will attend to the distribution among the different groups of defendants and require a pro-rating for the sole purpose of preventing one group from obtaining more of the penal sum of the bond than it would be entitled to provided the aggregates of the judgments exceeded said penal sum. In brief, the theory of the present action is to have all the law actions go to judgment and then have an accounting to ascertain the pro-rate share of each.

Even the assignment of errors as filed herein did not raise this issue. It is only as such assignment appears in the brief of appellant that the validity of the judgment of Mills et al. is questioned in relation to Leonard and Dithmer et al.

Such has been the theory of the case heretofore as established by the pleadings, arguments before the court, statements of counsel, the holdings of the court and the assignment of errors preparatory to this appeal. Such discussion is out of place on this appeal. It might be, however, that this Court will consider that this question must now be considered and an adjudication made thereon. In the event this Court does give consideration to this question, we offer the following argument:

It is necessary first to give notice to the decisions cited by and discussion of appellant wherein much has been made of this question. An examination of the cases quoted from shows that there is not a single one which will sustain the position that a judgment secured in a court of law is invalid as against other claimants who were not parties in that suit but have thereafter started another equitable action.

The case of Illinois Sur. Co. v. U. S., 226 Fed. 665, which is so copiously quoted from, does not involve the point at all. There were no other claimants who had already secured judgments on their claims, whose rights were involved in that suit.

Appellant does not claim that this case holds that a judgment at law obtained prior to the equitable suit would not be conclusive—at least to the pro-rate amount of the judgment—but is commented on as seeming “a clear authority on the right to pro-rate.”

The series of cases referred to on page 30 of appellant's brief, the first of said series being American Surety Co. v. Lawrenceville Cement Co., 96 Fed. 25, decided that under the act of August 13, 1894, 28 Stat. L. 278, there should be a pro-rating among the claimants, and in this first case the court makes the statement that a judgment at law would not be binding on the other suitors *to the full amount* of his judgment. But nowhere in these cases does it appear that the judgments obtained at law were invalid or not conclusive to the extent of the judgment creditors' pro-rate share. Rather do these cases hold that such

judgment is valid and conclusive as hereafter shown in this brief.

The New York cases, while upholding the jurisdiction of the equity courts in suits against the surety companies and holding that, under their form of statute, there should be a pro-rating, further hold that a judgment obtained at law before the equity suit is started is valid; and nowhere hold that the claim of the plaintiff, in such law action, need again be adjudicated.

In *Guffanti v. National Sur. Co.*, 118 N. Y. Supp. 207, there is no mention of any other claimants nor of any judgment which had been secured prior to that action or any statement as to how such judgment would be treated.

The only New York case wherein it appears that there had been other suits at law and judgments obtained in other courts is *Ill. Sur. Co. v. Mattone*, 122 N. Y. Supp. 928. Counsel for appellant attempts to make it appear that those who had secured judgments at law were compelled to come in and prove their claims over again. A careful reading of the opinion, however, discloses the fact that such was not the procedure. The court, on p. 929, makes the following statement:

“It is true that the Musco case, above cited, was an action at law by an individual claimant to recover his own loss, and was not for the benefit of creditors generally, and it also appears by the complaint in this action that judgments have been obtained against plaintiff in courts having no equitable jurisdiction.”

The court by its next statement clearly shows that it considers these judgments valid by reason of the fact that proper objection had not been made during the trials of the separate law actions.

“It does not appear, however, that the point was taken in any of these actions that an action at law would not lie at the suit of a single creditor, and in the Musco case it does appear that no such question was discussed or considered.”

Counsel had apparently suggested to the Court that as to those law actions which were still pending and which had not gone to judgment, the proper method would be to enter the defense that an equitable action had been started in which the rights of the plaintiffs in the law action then pending would be adjudicated. But the court, referring to those actions, stated:

“But even if plaintiff can successfully defend, upon this technical ground, the numerous actions brought against it at law, it is unreasonable that it should be compelled to incur the expense of doing so, when the claims of all parties can be equitably determined and adjudicated in an action properly brought for that purpose.”

This clearly shows that the equitable proceedings in that case were for the purpose of adjudicating the rights of those parties *who had not already proceeded to judgment*. The further reasoning of the court is all to the same effect. The one ground for upholding the equitable jurisdiction in these cases has been to avoid multiplicity of suits.

“In cases where many persons have claims *and are prosecuting or are about to prosecute them* at law against one of the defendants or class of defendants or a fund liable in equal degree to all those persons and to others, the court of equity, to forestall a multiplicity of actions, has jurisdiction of an action for a general accounting and adjustment of all the rights, and to restrain separate and individual actions at law in the same or other courts, thus bringing all the litigation into one suit. * * * * Such an action as this is not in the nature of an action of interpleader wherein several parties make conflicting claims to the same fund, but is entertained for the purpose of preventing a multiplicity of actions.”

If this be the main purpose, then nothing is to be gained by compelling one who has already secured a judgment against the Surety Company to come into the equitable action and again prove his claim. The effect of this would be to lengthen the proceedings, rather than to avoid excessive litigation. The only object of the equity suit is to stop those proceedings which are at the time being prosecuted, and to have those parties come in and prove their claims in the same suit.

Cappadonna v. Ill. Sur. Co., 125 N. Y. Supp. 162, referred to in appellant's brief, p. 44, was an action brought in equity by one creditor for himself and others. The Surety Co. had set up a defense of being discharged by reason of having paid “judgments up to and in excess of the sum of \$15,000.” On demurrer to this defense it was held that since the Company

did not allege that it had paid out \$15,000, but simply had paid judgments to the sum of \$15,000, the demurrer would be sustained. The reason for sustaining the demurrer was that the pleadings of the Surety Company would cover a case where the company had settled judgments which exceeded in amount \$15,000 by paying on a compromise a less sum. The Court, proceeding with a general discussion of the right to set up as a defense the payments of judgments, states:

“Under these decisions I think it very doubtful whether the defendant can plead the payment of judgments recovered in actions at law *to the full amount* paid thereon, if they would be more than the pro-rate share of the creditor. The defendant could have adopted in this matter the same procedure it used in the Mattone case.”

This certainly signifies that the New York court would permit a defense by the Surety Co. of the payment on prior judgments to the amount of the pro-rate share. This pro-rate share of their judgment is all Mills et al. are allowed by the order appealed from herein. This New York case, therefore, is not in favor of the appellant, but is contrary to its contention.

The Pennsylvania case, *Carson v. City etc. Sur. Co.*, 224 Pa. 223, 73 Atl. 425, which appellant has set out in full, is likewise unfavorable to appellant. The point under discussion was not clearly raised and decided therein, but the court, by force of necessity, was compelled to consider the validity of the prior

judgment which had been paid by the Surety Company and in holding that payment by the Surety Co. on said judgment to the amount of the pro-rate share thereof was a defense up to such proportionate amount, it decided that said judgment was a valid judgment even against third persons.

All the cases, therefore, which have been cited or quoted from simply hold that under the statutes upon which said cases arose the pro-rating theory has been followed by those courts. It may be that this is all counsel expected to prove by their use. Nevertheless, appellant has thrown in remarks here and there to the effect that some of the cases hold a judgment creditor at law must come into an equity court and prove his claim over again and that Mills et al. must now come into this equity suit and again prove their claim which formerly went to judgment. But said cases instead of proving this statement bring one irresistibly to the opposite conclusion.

Can an action on a surety bond given in pursuance to Sections 295, 296, Idaho Revised Codes, be prosecuted in law, or must it be in equity only? Once it is admitted that an action at law may be had under these sections, the conclusion must follow that a judgment recovered in such law action concludes not only the surety company, but other claimants as well. If this be not so, then the jurisdiction of the law court is of no consequence, and any proceeding therein a sham. Counsel for appellant recognizes how ridicu-

lous is their contention that the judgment is not conclusive against other claimants, if it can be shown the law court does have jurisdiction over this class of cases, so appellant has attempted to show that there is no jurisdiction except in equity. They base their argument on New York and federal cases. By the decisions of neither court are they sustained.

The question has arisen several times in the New York courts. Among the decisions commenting on this point, *Lordi v. People's Sur. Co.*, 126 N. Y. Supp. 180, is favorable in its result to the appellant; and even this case criticises the rule which it felt constrained to lay down by reason of a former New York decision. The decision of the Court of Appeals which is cited in that case as an authority, is *Cappadonna v. Ill. Sur. Co.*, 125 N. Y. Supp. 162. An examination of this case shows that the point was not decided therein. Other New York cases have settled the law in New York and there can be no further doubt as to this question. *Musco v. United Sur. Co.*, 117 N. Y. Supp. 21; *Alessandro v. Peoples' Sur. Co.*, 127 N. Y. Supp. 572, and *Carozza v. Peoples' Sur. Co.*, 131 N. Y. Supp. 448, have laid down the law in unmistakable terms. The *Alessandro* case, *supra*, was an action at law. The objection was made in this case that the law court had no jurisdiction and attention was called to the *Guffanti* cases. After referring to these cases, the court holds:

“The cases cited do not hold that an action at law can not be maintained upon the bond by a single depositor, where there is an entire absence

of proof of the existence of other creditors. In the case at bar there is no proof that the money of any persons other than the plaintiff was embezzled, and, so far as appears, at the time his action was commenced, he was the only creditor authorized to maintain an action upon the bond. In the absence of proof of the existence of other creditors entitled to share in the fund, no authority to which our attention is directed supports the contention that this action was not properly brought and properly disposed of."

In *Carozza v. Peoples' Sur. Co.*, 131 N. Y. Supp. 448, the action was brought on the law side of the court and counsel argued it should have been prosecuted in equity. It was held:

"There is nothing in the nature of the plaintiff's claim which precludes its prosecution at law, and it does not appear anywhere in the case that the claimants against the surety are numerous, or, in fact, that there are any claimants at all, except this plaintiff. There is, therefore, no reason for relegating plaintiff to an equity suit, or denying him his remedy at law."

These cases all arose under the same statute. The two cases last quoted show the final outcome of the controversy in New York over the jurisdiction of a law court to entertain such an action.

Likewise the decisions in the courts of the United States establish the principle that law courts have jurisdiction of this kind of an action. Most of the federal cases have arisen under the federal statute, 28 Stat. L. 278, 6 Fed. Stat. Ann. 125. This statute

was amended in 1905. As amended this statute provides that "only one action shall be brought," and that any person commencing this action shall give notice to all known creditors and make publication in some newspaper, after which any creditor may intervene; that the surety company shall pay the amount of the bond into court, whereupon a pro-rate distribution of the proceeds shall be made. It is not strange that some decisions interpreting this act have held that the one action should be brought in an equity court which would have charge over all proceedings and of the distribution. Such was the holding of *Ill. Sur. Co. v. U. S.*, 212 Fed. 136. However, even under this statute the Federal Courts have not been uniform in their decisions. In *Ill. Sur. v. U. S.*, 215 Fed. 334 at 339, where this same statute was involved, the court makes the following comment:

"Whether the action authorized by the statute in question is an action at law or in equity seems to us of no practical importance in this case, and therefore requires no discussion, because both parties duly waived a trial by jury and thereby in effect requested the court to try the case without a jury."

In *U. S. v. Wells*, 203 Fed. 146, the court stated:

"There is, in my opinion, strong ground for holding that the provision of this act that only one suit shall be instituted by a creditor or creditors and for notice to other creditors of their right to intervene, with the further provision that if the recovery on the bond is inadequate to pay the amounts due all creditors judgment shall be given

to each creditor pro rata of the amount of the recovery, has the effect of making the amount due on the bond a trust fund which can only be properly administered in equity and distributed among creditors in an equitable proceeding;

* * * * This view is emphasized by the fact that there is no right of intervention in a case at common law, and that a court of law has no adequate machinery for the entertainment and distribution of funds among the various beneficiaries entitled thereto. *McKemy v. Supreme Lodge* (C. C. A., 6), 180 Fed. 961, 966, 104 C. C. A. 117. See also 2 *Bates' Fed. Proc. at Law*, § 1042, p. 789. It is true, however, that on the other hand various actions at law have been maintained under this Act of 1905 in which no question as to the jurisdiction at law was suggested either by counsel or the court. *Hill v. Surety Co.*, 200 U. S. 197, 26 Sup. Ct. 168, 50 L. ed. 437; *Mankin v. Ludowici-Celadon Co.*, 215 U. S. 533, 30 Sup. Ct. 174, 54 L. ed. 315; *United States v. Construction Co.*, 222 U. S. 199, 32 Sup. Ct. 44, 56 L. ed. 163; *United States v. Winkler* (C. C.), 162 Fed. 397. * * * * Passing, then, this jurisdictional question, and assuming that, *at least without objection* of the parties, the jurisdiction at law may properly be entertained in this case,

* * * * ”

It therefore appears that even under this amendment of 1905, which has features calling for equitable jurisdiction stronger by far than any other statute which we have observed, the law court will entertain jurisdiction providing no objection is made thereto.

We now call attention to the statute before the amendment of 1905. The statute formerly read as follows:

“[The contractor shall] execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor * * * shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; * * * * upon which [bond] said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution; * * * * .”

6 Fed. Stat. Ann. 125. (28 Stat. L. 278.)

There is no decision holding that under this statute it was incumbent upon the plaintiff to start his suit in equity. The authorities are unanimous in giving to the law side of the court jurisdiction of actions brought under this statute. The case of *Ill. Sur. Co. v. U. S.* 212 Fed. 136, above quoted from to the effect that after the 1905 amendment the action should be in equity, distinguishes the statute as it read before the amendment. On page 138 the court states:

“The Act of August 13, 1894, entitled ‘An Act for the protection of persons furnishing materials and labor for the construction of public works,’ did contemplate separate actions at law upon the bond by any and all creditors in the name of the

United States but for their own use. *Parties obtaining judgment* would be paid in the order in which actions were brought.”

In *Mankin v. U. S.*, 215 U. S. 533, the court says:

“The present action accrued after the passage of the statute of February 24, 1905, amending the act of August 13, 1894, in which original act a right of action was given in the name of the United States for the use and benefit of the persons supplying labor or materials in the prosecution of work provided for in the contract, and requiring a bond for the benefit of such persons. In that act there was no limitation upon the number of actions which might be brought, nor was there any preference given to the United States in a recovery upon the bond.”

We now desire to call attention to the series of cases commencing with *Am. Sur. Co. v. Lawrenceville Cement Co.*, 96 Fed. 25, and referred to in appellant's brief, pp. 30-4. These cases arose under the statute above quoted and in our minds are authority for the proposition that the law court has jurisdiction of this class of cases, and that any judgment which is rendered by the law court is conclusive upon the other parties to the equity suit. After the equity suit was started the United States made a formal appearance therein by way of intervention (110 Fed. 913). It proceeded, however, with a law action to prosecute its claim. The defendant in the suit pleaded the payment of a former judgment and also set up the facts concerning the equity suit (the equity suit is reported 96 Fed. 25). The Surety Co. also made a motion for

a stay of proceedings in the law court. The judge, after holding that he had the power to grant the stay, nevertheless decided that he did not think it necessary to do so.

“So far as we can perceive, nothing would [be gained] except a speedier adjustment of all the questions involved, because we are of the opinion that the American Surety Company may, in this suit at common law, present to the court all the facts which are justifiable in the equity cause, so that thus, in this suit, we may apply the same rule of priority, if priority exists, or of pro rata distribution, if the law requires pro rata distribution, as the chancellor would. Consequently, as we are of the opinion that ultimately the United States can recover no more in this suit than if they were compelled to submit to our jurisdiction in the equity cause, so that all that could be gained thereby would be a speedier termination of the questions involved, our conclusion is that there are not sufficient substantial interests at stake to justify us in proceeding in the summary way which this motion asks for.”

United States v. American Surety Co., 110 Fed. 913.

The appeals from this decision, reported in 123 Fed. 287, 126 Fed. 811, sustain the holding of the court that it had jurisdiction to decide the case.

While discussing these cases, we desire to further call attention to the disposition made of the judgment of Lawrenceville Cement Co., which had been secured before the equity suit (96 Fed. 25) had been commenced. After the decision of 96 Fed. 25, the

claims of the different parties were filed before a master and proof made thereof. The Lawrenceville judgment had been paid by the Surety Co., which in turn had been reimbursed by a guarantor. On pro-rating, this judgment was turned in for its full amount and the decision of the court in *American Sur. Co. v. Lawrenceville Cement Co.*, 110 Fed. 717, at 724, shows that proof of this claim did not have to be made over again, but the judgment was considered conclusive.

“Therefore, with regard to the claim of the Lawrenceville Cement Company, the marshaling in this suit, with reference to all other creditors, is to be exactly the same as though the Lawrenceville Cement Company had not been in any part paid, or as though the American Surety Company had not been reimbursed. In determining, therefore, the pro rata distribution to the claimants who have been unsatisfied, the proper percentage, or the whole, as the case may be, of the claim of the Lawrenceville Cement Company, will be estimated as though still due from the complainant.”

We further desire to call attention to the quotation from the equity suit (96 Fed. 25, at p. 29), copied in appellant's brief at p. 32 and emphasized by italics.

“The question must arise, once for all, in each of the common law suits as to the actual amount of the claim in each of the others, and the determination must be final; and yet it could not be made in such way as to bind the other suitors. (The italics are ours.)”

This is evidently relied upon to show that a judgment obtained at law is not conclusive. When clearly understood, this statement conveys no such meaning. It was made by a court which had the opinion that even in a law action the principle of pro-rating would apply. According to this principle in each law action which was brought, the Surety Company would set up as a defense the amount of other claims for which it was being sued or would be sued. Proof of those several claims would be made by the Surety Company as a defense. But a determination as to the amount of these claims which are set up by the Surety Company as a defense would not be conclusive *upon those other claimants who would later prosecute their claims to judgment.*

The argument of the Court is for the purpose of showing that pro-rating should be allowed and that the equity court should take charge of all claims which have not gone to judgment before the date of the equity suit. It is not an argument against the conclusiveness of any judgment secured at law.

The following example will explain the theory of the Court. A, B and C have claims against a surety company on its bond, exceeding the penal sum thereof. A already has a judgment; B is prosecuting a law action; C has not yet started any action. In the law action of B, C not being a party thereto, the surety company would set up a defense for the purpose of compelling a pro-rating. It would introduce the judgment of A and proof as to the amount of the claim of C. The judgment of A would conclude the

amount of the claim of A, but proof of the claim of C would have to be made in detail. C, however, when he starts his law action at a later date, will not be bound by the determination of the court in the action of B, he not being a party thereto, as to the amount of his (C's) claim.

It will be seen, therefore, that all the United States cases have upheld the jurisdiction of the law side of the court. It is true that many of these cases have also upheld the theory of pro-rating. But as stated before in this brief the question of pro-rating is not at issue herein. Judgments may well be recovered in law actions and the principle of pro-rating be applied to those judgments. Such a procedure does not question the validity or conclusiveness of the several judgments, but simply marshals the assets which are to be applied to the satisfaction of such judgments.

The decisions hold the law court has jurisdiction. They force the conclusion that the law court has jurisdiction to entertain a case of this class. Once a case is started the court has jurisdiction of the subject matter and of the parties; it proceeds to judgment; all proceedings have been regular; an equity suit is started by other parties. On what ground are they to contest this law judgment? The only ground must be that the court had no jurisdiction when entering such judgments; but this contention is directly contrary to the premise with which we started, namely, that the court would have jurisdiction. There is no escape from the conclusion that when the equity suit is commenced, a judgment ob-

tained at law before such suit can not be questioned as to its validity, for if the court entering the judgment had jurisdiction of the subject matter and parties, its validity could be attacked only by reason of fraud or collusion. The only power which the equity court has is to control the assets which are to be used for the satisfaction of the judgment, and if the equity action be in that jurisdiction which upholds the right of pro-rating, the equity court will assign to the satisfaction of this judgment only the pro-rata share.

The Idaho State Court was of the opinion that it had jurisdiction of the Mills et al. action and had proceeded with the same to judgment. As a matter of fact no objection was made to the jurisdiction of the State Court on the ground that there should be a pro-rating or on the ground that there were other claimants who were not before the court. An examination of the statutes of the State of Idaho and the circumstances under which the Mills et al. action was prosecuted, make it certain that had such question been raised, the same would not have been sustained by the Idaho Court. Even if there had been no state or federal decisions upholding its jurisdiction, under said statutes and circumstances the court would never have doubted its jurisdiction.

In the first place, distinctions between actions at law and suits in equity and the forms of all such actions and suits are prohibited by Article V, Sec. 1, of the Constitution of Idaho. It is hardly possible therefore, that any objection could have been made to

the jurisdiction of the court in the Mills et al. action on the ground that the same should be prosecuted in the equity side of the court. Furthermore, Sec. 4111 Idaho Revised Codes, has provided the most extended license for intervention. Any person who has an interest in the matter in intervention may intervene in any action or proceeding. Any difficulties which the Federal Courts sometimes labor under by reason of the fact that the United States statutes did not provide for intervention, could not beset any judge sitting within the State of Idaho. And then the statutes directly involved herein necessarily imply that an action on said bond may be prosecuted by one person without giving notice to all others who might be interested and furthermore expressly negative the idea that there must be one suit only in prosecuting claims against a surety company.

“Every official bond executed by any officer pursuant to law is in force and obligatory upon the principal and sureties therein to and for the State of Idaho, and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity, and any person so injured or aggrieved may bring suit on such bond, in his own name, without an assignment thereof.”

Idaho Revised Code, §295.

“No such bond is void on the first recovery of a judgment thereon; but suit may be afterwards brought, from time to time, and judgment recovered thereon by the State of Idaho, or by any person to whom a right of action has accrued,

against such officer and his sureties, until the whole penalty of the bond is exhausted."

Idaho Revised Code, §296.

The federal cases have allowed separate actions at law on the contractors' bond set forth herein. The federal statute is silent as to whether or not more than one action would be allowed. Now what court would ever hold that only one equitable action could be had under the Idaho statute which specifically provides for more than one action? The Idaho Supreme Court, in construing said sections, has held that any aggrieved party may bring a separate action at law for damages thereunder and further that several aggrieved parties, under the same breach of the same bond, may join in one action at law under separate causes of action.

State ex rel. Mills v. Am. Sur. Co., 145 Pac.
· 1097.

State v. T. G. & S. Co., 152 Pac. 189.

There is a further distinction which makes such a decision on the part of the court all the more reasonable. Most of the bonds which are referred to in the United States cases are contractors' bonds. These were given when a certain contract was started. When that contract was completed there was a short length of time given in which the work was to be accepted. Within a short period those parties who had claims against the contractor could start their cause of action to recover against the contractor. This was on *one* piece of work and the liability on the bond

accrued for the different parties just about the same time, and suits would naturally be started about the same time.

The official bond involved in our present case is one which insured faithful performance on the part of the officer over a period of years. Causes of action on this bond might arise at any time over that period. These causes of action would not necessarily be related to the same transaction. There might be a negligent act in one part of the State in connection with the examination of one bank; two years later there might be another cause of action arise in another part of the State in connection with another transaction.

Let us adopt for a moment the contention of appellant herein, and consider a case which might arise thereunder.

Suppose a breach occurs immediately after an officer assumes the duties of his office; he is sued on this breach and judgment recovered, but before judgment is paid, another breach has occurred; an equitable action is started involving this breach and the plaintiff in the first suit is enjoined from levying execution and forced to come into this action and try his cause over again; another judgment is obtained, but before payment, a third breach has occurred upon which suit is brought. The plaintiffs in the first two suits must again come in and not only be enjoined from collecting their judgments, but must offer evidence and prove their claims to be valid once more. And so on ad infinitum.

The court must have had in mind this very distinction, when in *American Sur. Co. v. Lawrenceville Cement Co.*, 96 Fed. 25 at p. 27 it stated:

“On equitable principles, all individuals who may acquire rights under the bond stand in the same relation to each other as holders of several obligations secured by the same mortgage or deed in trust, specified therein, but issued at different dates. There is only one underlying equity, which necessarily, on equitable principles, protects all interested, whether it be the United States or individuals, share and share according to the proportions of their several claims. It is possible that, from the necessity of things, there may be exceptional instances, where one creditor has been allowed to *proceed to a prior judgment*; thus, through some laches, or in consequence of other liabilities *being contracted subsequently*, obtaining an unavoidable preference.

If in the interpretation of the Federal statute, separate law actions have been permitted, how much more reasonable to find such an interpretation under the Idaho statutes and the different conditions which they are meant to cover.

In sustaining the validity of judgments secured prior to an equity suit asking for a pro-rating, the courts have simply followed well-settled principles of law.

Mills, Leonard, Dithmer and others claim a liability against the Surety Company. Each stands in the relation of a creditor. They may proceed at dif-

ferent times (at least if no objection is made at time of suit) and secure an adjudication of their claims. If one has proceeded to judgment, this judgment is conclusive as to amount and validity against all persons.

“It is now well settled upon high authority that where no fraud or collusion has been shown in the recovery of a judgment, such judgment is conclusive of the fact and the amount of the indebtedness of the judgment-debtor, and it cannot be collaterally impeached by third persons in a subsequent suit where such indebtedness is called in question * * * And a judgment obtained without fraud or collusion is conclusive evidence, in suits between creditors in relation to the property of the debtor, of the fact and the amount of the indebtedness of the latter.”

Black on Judgments, §605.

The other general authorities support the law as laid down by Black.

Freeman on Judgments, Secs. 334-7.

Bigelow on Estoppel, 167-8.

Freeman on Executions, Sec. 136.

Bump on Fraudulent Conveyances, 576-7.

Wait on Fraudulent Conveyances, Sec. 270.

The leading case is *Candee v. Lord*, 2 N. Y. 269. In that case the court held:

“In creating debts, or establishing the relation of debtor and creditor, the debtor is accountable to no one unless he acts male fide. A judgment, therefore, obtained against the latter without collusion is conclusive evidence of the relation

of debtor and creditor against others: First, because it is conclusive between the parties to the record, who in the given case have the exclusive right to establish it; and second, because the claims of other creditors upon the debtor's property are thru him, and subject to all previous liens, preferences, or conveyances made by him in good faith. Any deed, judgment or assurance of the debtor, so far at least as they conclude him, must estop his creditors and all others. * * *

It follows from the principles suggested that a judgment obtained without fraud or collusion, and which concludes the debtor, whether rendered upon default, confession or after contestation, is upon all questions affecting the title to his property conclusive evidence against his creditors to establish, first, the relation of debtor and creditor, between the parties to the record, and second, the amount of the indebtedness."

This statement of the law is so convincing that this case has been cited and quoted from by all text-book writers and used as an authority in all later cases wherein this question was raised.

Bensimer v. Fell, 29 A. S. R. 774.

Weaver v. Haviland, 40 A. S. R. 631.

Alkire v. Richesin, 91 Fed. 79.

Ledoux v. Bank of Am., 48 N. Y. Supp. 771.

Moore v. Curry, 106 Ala. 284.

Hersey v. Benedict, 15 Hun. 282.

Such is the general principle of law covering this case. Appellant has failed to assign any reasons why the present case is any exception. The principle of this case has been followed where ordinary rela-

tions have existed between different creditors, and in no case analogous to the one at bar have the courts departed from the holding of the early New York decision.

The Federal decisions have treated this class of cases according to the principles of marshaling assets. The theory of equity jurisdiction advanced in the *American Sur. Co. v. Lawrenceville Cement Co.*, 96 Fed. 25, is stated on page 29 of that case as follows:

“Marshaling assets, however, is a favorite equitable ground of jurisdiction. In this case we have a quasi fund—that is, the penal sum of \$18,000, named in the bond executed by the complainant—to be distributed on an equitable basis among numerous claimants. It will be found, as we proceed, that this fund cannot be distributed expeditiously or justly without the aid of this court sitting in equity.”

In marshaling assets for the satisfaction of judgments and other claims the validity of the judgment is not questioned. Suppose A has two pieces of property, X and Y, each worth \$10,000. B secures a judgment against A for \$15,000. By the law of the State this judgment is made a lien upon all real estate of A. C later takes a mortgage on X. B starts to satisfy his judgment and issues execution on both X and Y. C goes into equity and asks that the assets of A be marshaled and that B satisfy his judgment as far as possible from Y. Can it be said that the claim of B, upon which he secured his judgment, is again put in proof in this equity suit?

A case based upon facts similar to this hypothetical statement arose in South Carolina. A statute of that State provided that, when a judgment against a railroad corporation for personal injuries was secured, the judgment should relate back to the time the cause of action arose and be a first lien. A mortgage on the property of the railroad company had been given; and at a later date a cause of action arose and judgment was secured by a passenger traveling with the company. Upon a foreclosure of the mortgage, this judgment creditor intervened and set up his prior right. The mortgagee claimed the right to dispute the validity of the judgment. The court held this right did not exist.

“When, in marshaling the assets of this insolvent railroad company, the mortgage creditors and those claiming through them are met by this judgment and its claim to priority, they have the right to examine it, to look into the cause of action, to ascertain when and where the action was brought, to know if the conditions of the law existing when their mortgage was executed have all been complied with. They have the right to inquire into the jurisdiction of the court, and, above all, they are entitled to know that there was no fraud or collusion or gross neglect in obtaining the judgment. But, when all these are established, this judgment, when duly pleaded and proved in the court of the United States sitting in South Carolina, has the effect, not only of prima facie evidence, but of conclusive proof of the rights thereby adjudicated. A refusal to give it force and effect in this respect, which it has in

the State in which it was rendered, denies to the judgment creditor a right secured to him by the constitution and laws of the United States.”

Central T. Co. v. Charlotte, C. & A. R. Co.,
65 Fed. 257, 262.

Other analogous cases arise in allowing claims in Bankruptcy, in receiverships, and in the settlement of estates.

No one would suggest that a claim which had gone to judgment prior to the death of the testator could be contested during the settlement of the estate, except as to the question of how or when the judgment was secured. The same principle is involved if it be true that the debts are in excess of the assets of the estate. The “fund” must then be distributed to the claimants. It avails the appellant nothing to say that it was unknown at the time of securing the judgment that there would be debts in excess of assets and therefore a “fund” for distribution; for the same may be true under the statutes involved herein. It has been shown above how one cause of action may have gone to judgment before another has arisen. If the cause of action first arising is for a sum less than the penal bond, there is no “fund” for distribution in this case either at the time of securing judgment.

The same rule applies when a judgment is presented in the bankruptcy courts:

“Where the amount of a claim has been determined by a State Court, and judgment entered therein, such judgment is conclusive upon the

bankruptcy court, and the judgment creditor will not be permitted to prove for a greater amount.”

Collier on Bankruptcy, 861 (10th ed.)

“The judgment, when offered for proof, may be attacked only for fraud, collusion or want of jurisdiction, under the usual rules.”

Remington on Bankruptcy, §682.

In none of these analogous cases has the principle as first laid down in *Candee v. Lord*, 2 N. Y. 269, been departed from.

The contention we make is not contrary to the best interests of the surety companies. In fact, the position which we are taking, viz., that law courts do have jurisdiction, is, in the majority of cases, favorable to the surety companies. Suppose an action is started at law by a single plaintiff, for a sum less than the amount of the bond. Does the company desire to force him into equity by means of an equity suit and bring in all others who may have claims against it? By no means, for if this plaintiff proceeds with his single cause of action, it may be that other creditors because of their laches or lack of interest will permit their causes of action to lapse. The company does not desire to excite more claimants to action. It will not raise the question of the jurisdiction of the law court. The one plaintiff secures judgment; and, if no other claimants have become active, the company will pay the judgment. But if other claimants have started suit so that the total amounts of all claims exceed the amount of the bond, they ask the aid of equity, in order to secure a pro-rating—

just as they have done in the case at bar. Such a procedure favors the company. But what justice is there in the claim of the surety company that the claim of plaintiff must be proven again in the equity suit when it was contested without objection to jurisdiction in the law court—the court where they desired the trial to be had?

Law courts have jurisdiction of this class of cases. In not a single case has an equity court refused to give full faith and credit to a judgment secured in a law court prior to the suit in equity asking for a pro-rating. The general principle of law must be departed from if such judgment is not held conclusive. In no analogous case has such a departure been made from this well-established principle of law, and no reason is assigned why such departure should be made in this case.

AS TO DEDUCTING DIVIDENDS FROM PRO RATE SHARE.

The argument of appellant that the dividends should be deducted from the pro-rate share of Mills et al. is without any force. The complaint shows that the aggregate amount of the claims is about \$90,000. It further appears in the proceedings for stay, pending the appeal, that the total amount of the three dividends paid by the Receiver is 18%. All parties have received the same per cent. Eighteen per cent of the \$90,000 would equal \$16,200, which, deducted from the \$90,000, would leave \$73,800 due Mills et

al., Dithmer et al. and Leonard. It thus appears that the amount still due would be in excess of the penal sum of the bond of \$50,000. As the Surety Co. is liable to the full amount of \$50,000, it makes no difference to it then whether Mills et al., Dithmer et al. and Leonard have received a part of the payment of their claims from another source, the bank itself. If they have in the aggregate sustained damages to the amount of \$90,000, then they would be entitled to collect, if they could, \$40,000 from other sources, or from the principal, and still hold the Surety Co. to the penal sum of its bond. Appellant argues that the total sum of the dividends of \$16,200 should be deducted from the \$50,000, the amount of the bond, in other words, that it should be given credit for the dividend regardless of how many thousand dollars the said parties had been damaged over the sum of \$50,000. It is evident that the Surety Co. could only ask to have the dividends deducted when they exceeded the sum of \$40,000, the amount of the damages above the amount of the bond. For instance, if all parties collected dividends to the amount of \$60,000, then there would remain due them only \$30,000, and the Surety Co. would, of course, be entitled to have the amount of \$20,000 deducted from the amount of the bond so that it would only have to pay the balance of \$30,000 due.

In arriving at the pro-rate share, the dividends received would not effect the computation. All parties received the same per cent, and therefore, if the same per cent of dividends were deducted from the claims

of the different parties and then the pro-rate share determined, it would be the same and would in no way change the pro-rate share.

We shall not pursue the argument further on this question of deducting dividends as appellant in its brief has simply referred to the matter without presenting any argument thereon.

We believe that if this Court comes to the conclusion that it must determine whether or not the judgment of Mills et al. is conclusive against Leonard and Dithmer et al., that then we have herein shown that said judgment is conclusive and Mills et al. should be allowed to collect its pro-rate share without waiting years for the determination of the actions now pending, and that therefore the judgment of the lower court should be sustained.

Respectfully submitted,

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Residence: Boise, Idaho.

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. L. ALVERSON,

Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Eastern District of Washington, Northern Division.

Filed

JAN 13 1916

F. D. Monckton,
Clerk

United States
Circuit Court of Appeals
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J. L. ALVERSON,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the Superior Court of the State of Washington
in and for the County of Spokane.*

No. 2023.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation, and J.
A. CAUGHREN, CARLOS N. BOYNTON,
H. W. CHURCH, S. A. McCOY and MAR-
TIN WOLDSON, Copartners Doing Business
Under the Firm Name and Style of CAUGH-
REN, BOYNTON & COMPANY,

Defendants.

*Page-number appearing at foot of page of original certified Record.

Complaint.

Plaintiff complains of defendants and for cause of action alleges:

I.

That the Oregon-Washington Railroad & Navigation Company is now, and was at all times herein mentioned, a corporation created, organized and existing under and by virtue of the laws of the State of Oregon, and engaged in the construction of a certain line of railroad between and within the city of Spokane, Washington, and a place known as Ayer Junction, including the construction of bridges, cuts, fills, concrete abutments and other structures necessary to be constructed for the purpose of building and completing the line of railroad.

II.

That the individual names of the above-named defendants are now, and were at all times herein mentioned, a copartnership, and said parties were at all times herein mentioned doing business as a copartnership under the firm name and style of Caughren, Boynton & Company.

III.

That for the purpose of constructing said line of railroad and the necessary structures incident thereto said Oregon-Washington Railroad & Navigation Company, defendant herein, entered into a contract [2] to and with said Caughren, Boynton & Company, wherein and whereby said Caughren, Boynton & Company agreed to build and construct all concrete abutments, foundations, piers, pedestals and culverts to be constructed on said line

of railroad by said railroad company between the eastern limits, to wit: Post Street in the city of Spokane, State of Washington, and the Hangman Creek and Spokane River Bridge, which contract is now in the possession of the above-named defendant, to which reference is hereby made for greater particularity.

IV.

That thereafter said Caughren, Boynton & Company sublet said contract to J. L. Alverson and L. L. Koeper, copartners of Spokane, Washington, a copy of which contract is hereto attached and marked exhibit "A."

V.

That thereafter, on, to wit, the 23d day of January, 1912, by mutual agreement of the parties, and for the purpose of transferring all of the rights in and to said contract of Alverson *and* Koeper, to this plaintiff, an agreement was entered into between Alverson & Koeper and Caughren, Boynton & Company, and thereafter the copartnership of Alverson & Koeper was dissolved, which agreement, both as to the contract and as to the dissolution of the copartnership, is hereto attached and marked exhibits "B" and "C."

VI.

That said defendants at all times knew of the contracts hereinbefore referred to and acquiesced in all of them.

VII.

That thereafter Caughren, Boynton & Company and this plaintiff entered into an agreement wherein and whereby the said plaintiff herein agreed to carry

out and perform the contract which had previously been entered into between Caughren, Boynton & Company and Alverson & Koeper, and said contract was reinstated in so far as [3] this plaintiff was concerned in all its particulars, and thereafter plaintiff commenced performing said work and furnishing the materials therein mentioned, and purchased a large amount of equipment in preparing to perform said contract, which reinstatement contract is hereto attached and marked exhibit "D."

VIII.

That plaintiff has always been ready, able and willing to perform said contracts, and do and perform all the matters therein mentioned and furnish all of the materials and equipment necessary therefor, and so advised the officers of said defendants, and frequently requested defendants to inform him, the plaintiff, when they were ready for him to go to work and perform said contract. That the plaintiff could not proceed with the performance of said contract until notified so to do by the officers and agents of said defendants, and waited a number of months patiently for said notification and for said defendants to have matters and things so prepared so that plaintiff could go ahead with the work.

IX.

That after plaintiff had entered into the contracts hereinbefore mentioned, and after he had performed part of said work, said defendants, among themselves, entered into a contract, a copy of which is hereto attached and marked exhibit "E," which said contract was made on behalf of said defendant, Caughren, Boynton & Company, and also on behalf

of this plaintiff, who was at the time the only subcontractor under Caughren, Boynton & Company, for the performance of any of said work, and said contract contains the following clause:

“In event that the railroad company does not elect, within thirty days from the date hereof, to have the contractor complete the structures, the construction of which have not at this date been commenced, then and in that event the railroad company shall assume all obligations of the contractor to the party or parties holding subcontracts for the construction thereof, and said arbitrators shall determine the amount of profit which the contractor might reasonably have made upon said portions of said work, and make an award thereof, which shall be paid by the said railroad [4] company in consideration of the cancellation of said contract as to said work.”

X.

That thereafter the said railroad company did not elect, within thirty days from the date of said last-mentioned contract, to have the contractor complete the structures which at that time had been commenced, but thereafter entered into a contract with other contractors who had no connection whatsoever with this plaintiff or with Caughren, Boynton & Company, to perform all of said work and furnish all the materials which were contained in the contract heretofore entered into between the defendants and between Caughren, Boynton & Company and this plaintiff, and refused, failed and neglected to permit this plaintiff to go ahead with said

work and complete the same.

XI.

That the amount of the cement work which under said contract this plaintiff had a right to perform and furnish the materials for between the points mentioned, to wit: Post Street in the city of Spokane, and the confluence of Hangman Creek (now Latah Creek) and the Spokane River, would be approximately twenty-five thousand (25,000) yards, upon which plaintiff would have realized a profit of seventy-one thousand, seven hundred and fifty dollars (\$71,750).

XII.

That defendants have failed, neglected and refused to permit plaintiff to perform said contract and have by their agreements and stipulations, acts and doings, taken the matter wholly out of plaintiff's hands and have not in any manner adjusted or settled the loss sustained by plaintiff by reason of the violation of said contracts by defendants and each of them, and said work has now been completed by other contractors, and by reason of the breach of contracts on the part of defendants and the wrongs committed by them as herein mentioned, and by reason of the loss of [5] profits which would have been realized and received by plaintiff had he been permitted to carry out said contract and was prevented by reason of the acts and doings of said defendants, plaintiff has been damaged in the sum of seventy-one thousand, seven hundred and fifty dollars (\$71,750.00), no part of which has been paid.

WHEREFORE, plaintiff demands judgment against the above-named defendants, and each of

them, for the sum of seventy-one thousand, seven hundred and fifty dollars (\$71,750), and his costs and disbursements herein.

(Signed) PLUMMER & LAVIN,
Attorneys for Plaintiff.

State of Washington,
County of Spokane,—ss.

J. L. Alverson, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof, and that the same is true, as he verily believes.

(Signed) J. L. ALVERSON.

Subscribed and sworn to before me this 10th day of July, 1914.

(Signed) GERTRUDE KENDRICK,
Notary Public in and for the State of Washington,
Residing at Spokane. [6]

Exhibit "A" [to Complaint—Memorandum of Agreement, etc.].

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, THIRD DISTRICT.

Memorandum of Agreement.

THIS AGREEMENT, made this day of, one thousand nine hundred and eleven, by and between Caughren, Boynton & Company, of Spokane, Wash., a copartnership, party of the first part, hereinafter designated, also, as the "Railroad Company," and J. L. Alverson and L. L. Koeper of Spokane, Wash., known as Alverson & Koeper, a copartnership, party of the second part, hereinafter

designated, also, as the “Contractors,” Witnesseth:

That the Contractors, for and in consideration of the covenants, stipulations and agreements to and with the Railroad Company, as hereinafter mentioned, promises and agrees to execute, construct and finish in every respect, in the most substantial and workmanlike manner, and to the satisfaction and acceptance of the Chief Engineer of the Railroad Company’s Third District, all the following work, to wit: All of the proposed work as specified below, between Hangman and Spokane River Bridge (not including this bridge) to the eastern limits of contract, all in the State of Washington.

Also culverts sta. 647, 664, 700, 734, 739, 838.

The Contractor agrees to commence work in 10 days from the date of this instrument, and to prosecute the same with such force and means as will in the opinion of said Chief Engineer insure the completion of the same on or before; said work to be subject at all times to the inspection of said Chief Engineer, and to conform to the rules and general specifications included herein and made a part of this agreement, and to the following general covenants:

1. Where the work “Engineer” is used in this instrument [7] it shall be understood to refer to the Chief Engineer of the Railroad Company’s Third District, and it is expressly agreed that the powers and authority herein conferred upon him shall in no degree extend to his assistants, unless he shall specifically delegate the same in writing.

2. The Contractor, for the consideration herein-

after provided, hereby agrees not to assign or transfer this contract, or re-let any of said work, in whole or in part, without the written consent of the Railroad Company, or the Engineer, but shall constantly prosecute said work in person.

3. It is mutually agreed between said parties, that to prevent or settle all disputes and misunderstandings between them in relation to any of the stipulations contained in this agreement, or their performance by either of said parties, that the Engineer shall be, and hereby is made, an Umpire to decide all matters arising or growing out of this contract.

4. It is further understood and agreed that if the Contractor, in the opinion of the Engineer (communicated in writing by the Engineer to the Contractor) shall fail or refuse to comply with any of the stipulations contained in this contract to be performed by the Contractor, or shall at any time neglect or refuse to prosecute the work with a sufficient force, to insure the completion of the work within the time specified herein, then the Railroad Company may, at its option, after the expiration of 10 days from the mailing of such notice to the Contractor at his Post Office address, cancel this contract and declare the same void, and a notice in writing mailed to the Contractor at his Post Office address, signed by the Railroad Company, shall be sufficient for that purpose. In the event the contract is cancelled as herein provided, the Contractor shall have no claim whatever against the Railroad Company for damages, and all compensation or percentage

unpaid to the Contractor under the provisions of this contract [8] shall be retained by the Railroad Company, together with any material then on the ground belonging to the Contractor, to indemnify it from any loss by reason of the default of the Contractor, and the Railroad Company may, at its option, employ other parties to complete said work or any part thereof, and any loss occasioned by reason of such default to be chargeable against the Contractor, the amount of such loss to be estimated by the Engineer, whose decision shall be final and binding on the parties hereto.

5. It is further agreed that whenever, in the opinion of the Railroad Company, it may be necessary in order to secure the payment of wages of laborers employed by the Contractor, or the payment of material men, the Railroad Company is hereby authorized to pay the amounts due them and deduct the same, attested by the receipts of such laborers and material men, from any sum which may be payable to the Contractor.

6. It is agreed between said parties, that if in the opinion of the Railroad Company it may be for any reason necessary to stop any or all of said work, or to diminish the force employed, the Railroad Company shall have the right to do so, and the Contractor, in that event, shall have no claim for damages, but shall immediately stop the work or diminish the force, as the Railroad Company may direct.

7. It is further agreed that the Contractor shall not be entitled to any damages occasioned by delay in the performance of the work by any other Con-

tractor adjoining the work herein contracted or for delays in securing rights-of-ways.

8. It is further agreed that when any work under this agreement shall be done by the Contractor at the request of the Engineer, and for which no price is specified, the Contractor shall be entitled to a price to be fixed and determined by the Engineer.

9. It is further agreed that if the Contractor shall execute any part of said work defectively and if such imperfection [9] shall not be of sufficient magnitude to require, in the opinion of the Engineer, the taking up and rebuilding of such imperfect part, the Engineer shall have power, and he is hereby authorized to make any deduction by him deemed proper, from the stipulated price for such work, on account of the defective part.

10. It is further agreed and expressly understood, that the decision of the Engineer, on any point or matter touching this agreement, shall be final and conclusive between the parties hereto, and each and every of said parties hereby waives any and all right of action, suit or suits, or other remedy, in law or equity, under this contract, involving decisions made or to be made by the Engineer.

11. It is further agreed between the parties hereto that in the performance of the work herein contracted, the Contractor shall be solely liable for any and all injury or damage to persons or property caused by negligence, including the acts of agents, servants and employees, and the Contractor shall and will indemnify and save harmless the Railroad Company from any and all loss, costs or expense on

account of any such injury or damage.

12. It is further agreed that the Contractor shall deduct from each employee's wages engaged upon the work covered by this contract the usual monthly hospital fee, as established by the Railroad Company's rules covering hospital service and regulations; and that such hospital fees are to be remitted promptly at the close of each month to the Assistant Treasurer of the Railroad Company at Portland, Oregon, and to send a statement showing the number of employees employed for such month upon the work covered by this contract, to the Engineer.

Monthly payments on account of this work will be made as follows: On or about the 15th day of every month, ninety per cent (90%) of the amount due for all work done during the previous month, as shown by estimates of the Engineer made to the Railroad [10] Company, will be paid; and it is agreed between said parties that the Railroad Company shall have the right to retain ten per centum (10%) of each and every estimate made by the Engineer on said work until the whole has been entirely finished and completed to the satisfaction and acceptance of the Engineer, and he shall have furnished a certificate thereof to the Railroad Company.

It is further agreed between said parties that the Contractor shall be paid in the manner above stated, only for the actual work done and materials furnished.

The Contractor agrees to furnish, execute and deliver to the Railroad Company a good and sufficient

bond, satisfactory to it, in the sum of twenty-five per centum (25%) of the estimated amount of this contract, conditioned upon the faithful and satisfactory execution thereof in accordance with all of its terms; said bond to indemnify the Railroad Company against all claims for material furnished and labor performed, and against any and all other liabilities and any danger or loss by reason of the non-performance of this contract, and said bond to be further conditioned as provided by Section 1129 of Remington and Ballinger's Statutes of the State of Washington, or any amendments thereof.

Changes or alterations may be made in the terms and conditions of this agreement upon the written consent of the parties hereto. Such changes or alterations to become effective must be endorsed upon the original contract and be witnessed by the signatures of two or more disinterested parties.

In consideration of the above Caughren, Boynton & Company agree to pay the following prices:

Dry Earth Excavation, per cubic yard.....	.40
Dry Loose Rock Excavation, per cubic yard..	.58
Dry Solid Rock Excavation, per cubic yard..	1.10
Wet Earth Excavation, per cubic yard with hand pump85
Wet Earth Excavation, per cubic yard with steam pump.....	1.30
Wet Lose Rock Excavation, per cubic yard with hand pump.....	1.30
Wet Loose Rock Excavation, per cubic yard with steam pump.....	1.95
Wet Solid Rock Excavation, per cubic yard with hand pump.....	2.00

Wet Solid Rock Excavation, per cubic yard
with steam pump..... 3.50

[11]

Back Filling, per cubic yard..... .20
Timber and plank for sheet piling and bra-
cing for excavation, per M. ft. B. M.... 26.00
Foundation piles in place (ordered lengths)
per lin. ft..... .30
Hauling concrete and reinforcing material,
per ton per mile, one mile free haul.... .40
Hauling timber, per M. per mile, one mile
free haul..... .70
Hauling piles, per Lin. ft. per mile, one mile
free haul..... .003¼
Reinforcing rods, furnishing and placing,
per lb..... .037/8
Plain concrete 1, 3 & 6, per cubic yard..... 6.30
Plain concrete 1, 3 & 5, “ “ “ 6.90
Reinforced concrete, 1, 2 & 4, per cubic yard. 10.40

IN WITNESS WHEREOF, the said parties
hereto have signed this agreement at Spokane,
Wash., the day and year first above written.

(Signed) CAUGHREN, BOYNTON &
COMPANY,

By SAM'L A. McCOY.
ALVERSON & KOEPER,
J. L. ALVERSON,
L. L. KOEPER.

W. W. MITCHELL.

L. MOREL. [12]

THE NORTH COAST RAILROAD COMPANY.
SPECIFICATIONS.

Cement and Cement Tests.

Definition.

1. The cement for all structures must be high grade Portland Cement, unless otherwise specifically specified. By the term "Portland Cement" is meant the product obtained by grinding to a fine powder the clinker resulting from the calcination to incipient fusion of an intimate mixture of properly proportioned argillaceous and calcareous materials, to which no addition greater than 3 per cent. has been made subsequent to calcination.

Composition.

2. The cement must be of normal composition for the brand supplied. It must not contain more than 1.75 per cent. of sulphuric anhydride (SO), nor more than 3 per cent. of magnesia (MGO). The cement must not be adulterated with furnace slag, natural cement, limestone, or hydraulic lime. The question of adulteration may be determined either by chemical analysis or by inspection of the process at the factory.

Weight per Barrel or Sack.

3. The average weight per barrel must not be less than 376 pounds net, and that per sack not less than 94 pounds net. If the weight, as determined by test weighings, is found below 376 pounds per barrel, the contractor will be required to supply, free of cost, an additional amount of cement equal to the estimated shortage.

Delivery in Good Condition.

4. The cement must be delivered in good condition, and any package that is broken may be rejected or accepted as a fractional package at the option of [13] the Engineer.

Sampling.

5. Samples of cement will be taken from individual packages in such a manner as to secure fair average samples of each package sampled. It will usually be considered sufficient if a sample is obtained from each five barrels, or each ten sacks, although such additional samples may be taken as the Engineer may deem necessary to determine quality beyond a question. Where the results of tests indicate unusual variations from the normal characteristics of the cement, this will be considered good cause for rejection. The engineer may, at his option, permit samples to be taken from cement in bulk in bins, the cement afterward being held until the results of tests determine the quality of the cement sampled.

Specific Gravity.

6. The specific gravity of the cement, thoroughly dried at 100 degrees Centigrade, shall be not less than 3.10.

7. The cement must leave a residue of more than 8 per cent. by weight on the standard No. 100 sieve, and a residue of not more than 25 per cent. on the standard No. 200 sieve.

Time of Setting.

8. The cement, when made into paste of normal consistency, must develop initial set in not less than

30 minutes and must acquire final set in not less than one hour nor in more than ten hours.

Soundings.

9. Pats of neat cement paste will be made, of normal consistency, and molded on glass plates. They will be about 3 inches in diameter, one-half inch thick at the center, tapering to a thin edge, and will be kept in moist air for a period of twenty-four [14] hours.

- (a) A pat will then be kept in air at normal temperature and observed at intervals for at least 28 days.
- (b) Another pat will be kept in water maintained as near 70 degrees Fahrenheit as practicable, and observed at intervals for at least 28 days.
- (c) A third pat will be put into water, the temperature of which is to be raised to the boiling point and kept at that point for six hours.

These pats must remain firm and hard and show no signs of distortion, checking, cracking or disintegrating.

Making Briquettes.

10. In making neat briquettes, cement pats of normal consistency will be thoroughly mixed with a trowel and kneaded into the molds with a blunt stick, or a plunger. In making mortar briquettes about one-half as much water as is used for neat briquettes will be used, and the proportions will be one part by weight of cement to three parts of standard sand.

Tensile Strength.

11. The neat briquettes, prepared as specified above, shall stand a minimum *tensil* stress per square inch as follows:

For one day in air and six days

in water.....450 lbs.

For one day in air and twenty-

seven days in water.....550 lbs.

The mortar briquettes, prepared as specified above, shall stand a minimum *tensil* stress per square inch as follows:

For one day in air and six days

in water150 lbs.

For one day in air and twenty-

seven days in water.....225 lbs.

The average of the twenty-eight day briquette tests must always be higher than that of the seven day tests. [15]

Rejections.

12. A cement will be rejected that fails to meet any of the above requirements.

Laboratory Practice.

13. The standard sieves, Vicat needle and standard sand and the terms "normal consistency," "initial set," "final set," referred to and used in these specifications are those recommended and defined by the Committee on Uniform Tests of Cement, of the American Society of Civil Engineers in its progress report presented at the annual meeting, January 21, 1903, and amended at the annual meeting, January 20, 1904. The methods followed in the laboratory will, in general, conform to those recommended by that committee. [16]

THE NORTH COAST RAILROAD COMPANY.

Concrete Masonry Specifications.

CONCRETE MASONRY. Concrete may be constructed with broken stone or gravel.

The stone shall be sound, durable limestone, or other hard stone acceptable to the Engineer, which in place in the quarry shall ring under the hammer. It shall be crusher run, with all dust removed, and broken to pass in any direction through a one and one-half inch ring.

The gravel shall be composed of clean pebbles of hard and durable stone of such size that any piece will pass through a one and one-half inch ring, free from clay and other impurities except sand. When containing same the amount per unit of volume of gravel shall be determined accurately to admit of the proper proportion of sand being maintained in the concrete mixture.

Concrete shall be made of three classes. The Contractor will make separate prices for each.

Class A concrete shall be composed of: 1 part of cement, 2 parts of sand, 4 parts of stone or gravel. This class will be used only in reinforced concrete work in certain parts of thin walls and arches.

Class B concrete shall be composed of: 1 part of cement, 2½ parts of sand, 5 parts of stone or gravel. This class will generally be used for arches, piers, reinforced concrete, and tunnel linings.

Class C concrete shall be composed of: 1 part of cement, 3 parts of sand, 6 parts of stone or gravel. This class will be used in foundations, abutments, retaining walls and heavy work generally.

The cement, sand and stone shall each be measured loose.

Where the volume of concrete to be placed at any one point exceeds one hundred cubic yards, the concrete shall be mixed at that point by a machine batch mixer approved by the Engineer. Continuous mixers will not be allowed.

Where the volume of concrete to be placed at any one point is less than one hundred cubic yards, the concrete may be mixed by hand, in which case: (1) Tight platforms shall be provided of sufficient size to accommodate men and materials for the progressive and rapid mixing of at least two batches of concrete at the same time. Batches shall not exceed one cubic yard each, and smaller batches are preferable, based upon a multiple of the number of sacks to the barrel.

(2) Spread the sand evenly upon the platform, then the cement upon the sand and mix thoroughly until of an even color. Add all the water necessary to make a thin mortar and spread again; add the gravel or the broken stone, which, if dry, should first be thoroughly wet down. Turn the mass with shovels until thoroughly incorporated, and all the gravel or stone is covered with mortar; this will require the mass to be turned on the mixing board not less than four times.

(3) Another approved method, which may be permitted at the option of the Engineer, is to spread the sand, then the cement, and mix dry; then the gravel or broken stone; add water and mix thoroughly as above.

The concrete shall be of such consistency that when dumped in place it will not require much tamping. It shall be spaded down and tamped sufficiently to level off, after which the water should rise freely to the surface. [17]

Forms shall be well built, substantial and unyielding, properly braced or tied together by means of wire or rods, and shall conform to lines given.

For all important work the material used shall be dressed matched lumber, sound and free from loose knots, secured to the studding or uprights in horizontal lines.

For backing and other rough work undressed lumber may be used. In foundations the pits shall be sheeted up with undressed lumber to keep the concrete clean.

Where corners of the masonry and other projections liable to injury occur, suitable mouldings shall be placed in the angles of the forms to round or bevel them off.

Planking once used in forms shall be cleaned before being used again.

The forms must not be removed within seventy-two hours after all the concrete in that section has been placed. Forms supporting arches shall not be removed under fourteen days from time of completion of the arch. In freezing weather the forms must remain until the concrete has had a sufficient time to become thoroughly set.

In dry but not freezing weather, the forms shall be drenched with water before the concrete is placed against them.

Each layer should be left somewhat rough to insure bonding with the next layer above; and, if it be already set, shall be thoroughly cleaned and scrubbed with coarse brushes and water and flushed with cement grout before the next layer is placed upon it.

Concrete shall be deposited in the moulds in layers eight inches in thickness, and must be spread in layers at right angles to the lines of pressure. Temporary planking shall be placed at ends of partial layers, so that none shall run out to a thin edge. Excepting in arch work, all concrete must be deposited in horizontal layers of uniform thickness throughout. The ends, where a full layer cannot be laid at the time, shall be squared off by vertical temporary planking.

In Arch Work the construction of the arch ring must proceed continuously and without interruption from the time it is started until completed, work being begun at both abutments simultaneously and carried at a uniform rate of progress therefrom until joined in completion at the crown of the arch.

The thickness of the layers and the degree of ramming shall be such as specified for the other work, but the layers must be placed as near radially as practicable, and the ramming done in a direction as nearly at right angles thereto as possible.

Should the size of the arch be such as to make it impracticable to construct the entire ring in one day it may be divided vertically into a series of parallel rings of such width that one ring can be constructed continuously. The width of such ring shall however in no case be less than five feet. One side of this

subring shall be formed against the ring previously constructed, and the other side against a substantial vertical partition which must be removed immediately before commencing the next ring. In order to form a substantial bond between the adjacent parallel rings, cleats shall be fastened to the partitions in such locations and of such shape and dimensions as shall be directed by the Engineer.

In constructing new rings against old ones, the vertical surface of the old ring shall first be thoroughly cleaned and scrubbed with coarse brushes and water and then flushed with cement grout immediately before the placing of the new concrete.

In no case shall the work stop within eighteen inches of the top of the wall.

Concrete shall be placed immediately after mixing and any concrete not placed within thirty minutes of the time the water was first added shall be rejected.
[18]

In exposed work expansion joints may be provided at intervals of fifty or as the Engineer may direct.

In ordinary short walls the joint may be made by setting up a temporary vertical form or partition of plank and completing the section behind it as though it were the end of the structure. The partition will be removed when the next section is begun and the new concrete placed against the old without mortar flushing. Locks shall be provided if directed or called for by the plans.

A shovel facing may be made on the face and back of the structure by carefully working the coarse stone back from the form by means of a shovel or

spade so as to bring the excess mortar of the concrete to the form, or,

About one inch of mortar (no grout) of the same proportions as used in the concrete shall be placed next to the forms immediately in advance of the concrete.

Care must be taken to remove from the forms the dried mortar which spatters against them, in order to secure a perfect face.

After the forms are removed, which should generally be as soon as possible after the conditions above referred to are fulfilled, any small cavities or openings in the face shall be neatly filled with mortar. Any ridges due to cracks or joints in the lumber shall be rubbed down with chisel or wooden float. The entire face may then be washed with a thin grout of the consistency of whitewash, mixed in the same proportion as the mortar of the concrete. The wash should be applied with a brush. The earlier the above operations are performed the better will be the result.

The tops of bridgeseats, pedestals, copings, wing walls, etc., shall be finished with a smooth surface composed of one part cement to two parts of screenings, or sand, applied in a layer of from one-half to one inch thick. This must be put in place with the last course of concrete. The finishing coat must be repeatedly trowelled so as to make an impervious coat of the character of the best sidewalk work.

Where concrete is deposited in connection with metal reinforcing, the greatest care must be taken to insure the coating of the metal with cement, and the

thorough compacting of the concrete around the metal. Wherever it is practicable the metal should be placed in position first. This can usually be done in the case where the metal occurs in the bottoms of the forms, by supporting the same on traverse wires, or otherwise, when the bottoms of the forms can be flushed with cement mortar, so as to get the mortar under the metal at the same time, and the concrete deposited immediately afterward. The mortar for flushing the bars should be composed of one part cement and two and one-half parts sand. The metal used in the concrete shall be free from dirt, oil or grease. Rust is not objectionable, but all mill scale should be removed by hammering the metal, or preferably by pickling the same in a weak solution of Muriatic acid. No reinforced concrete shall be laid in freezing weather.

Unless otherwise specified the Railroad Company will furnish f. o. b. cars at nearest railway station the metal necessary for reinforcing. The Contractor will unload and haul the same to the structure.
Spokane, Washington. [19]

Exhibit "B" [to Complaint—Agreement].

AGREEMENT.

In consideration of the payment of \$743.86 made this date to Alverson & Koeper, sub-contractors, under contract dated May 15th, 1911, with Caughren, Boynton & Company, covering such work as specified between Spokane, Wash., and Ayer, Wash., on the O. W. R. & N. Co., all parties agree to cancel the contract as far as any future contemplated work is concerned and this settlement is in full for all past

work performed of whatever nature.

We, Alverson & Koeper, relinquish all claims of every description against Caughren, Boynton & Company, of the O. W. R. & N. Co. in consideration of the above.

(Signed) ALVERSON & KOEPER,

By J. L. ALVERSON.

We, Caughren, Boynton & Company, relinquish all claims against Alverson & Koeper for performance of any future work that may be required of our company by the O. W. R. & N. Co.

(Signed) CAUGHREN, BOYNTON & CO.

By SAM'L A. McCOY.

Signed this 23d day of January, 1912.

CAUGHREN, BOYNTON & CO.

SAM'L A. McCOY.

ALVERSON & KOEPER.

J. L. ALVERSON.

L. L. KOEPER.

Witness:

H. F. ALDRICH.

B. M. SYMINGTON. [20]

**Exhibit "C" [to Complaint—Articles of
Dissolution].**

ARTICLES OF DISSOLUTION
OF THE

COPARTNERSHIP FIRM OF ALVERSON &
KOEPER.

This AGREEMENT, entered into between James L. Alverson, L. L. Koeper and Harry H. Koeper this 19th day of January, 1912, witnesseth:

That the above-named parties have heretofore

been engaged in a contracting business under the firm name and style of Alverson & Koeper, and now wishing to dissolve said firm they have and hereby do mutually agree as follows, to wit:

1. That said partnership be and the same is hereby dissolved and terminated upon the following terms:

a. That said Koepers shall receive from the said Alverson five promissory notes executed by the said Alverson and James Z. Moore and Lawson Moore for the sum of four hundred dollars, each payable on or before one year from date, and bearing six per cent. per annum interest, said interest to be payable at the expiration of each note.

b. Also seven hundred and forty-three dollars, due said firm of Alverson & Koeper or whatever sum shall be due on their contract with Caughren, Boynton & Company, a firm of contractors of Spokane, Washington.

c. The said Koepers agree to assume the debt of Alverson & Koeper to the Washington Trust Company, supposed to be about the sum of fifteen hundred and fifty-seven dollars and interest thereon, and any other debts of that firm.

d. The said Koepers are to release the contract of Alverson & Koeper with the firm of Caughren, Boynton & Company for certain work to assign all interest in said contract to said Alverson so that said Alverson shall have all interest of Alverson & [21] Koeper in said contract.

e. The said Koepers sell, assign and transfer all their interest in the outfit of Alverson & Koeper, of

whatsoever kind, to said Alverson, and agree to execute to him a bill of sale to the said outfit, some of which is located now at or near the village of Marshall, Spokane County, Washington, some of it in the possession of the Pacific Transfer Company and all of which is to be more particularly described in said bill of sale, but wheresoever it may be, it is and shall be the property of the said Alverson. The books of the said firm are included in the firm outfit and are to be delivered to and be the property of said Alverson.

f. The said Alverson is also to pay the Koepers the sum of one hundred dollars in case, receipt whereof is hereby acknowledged by the said Koepers.

g. The office furniture of the said firm is included in the term outfit and is to be delivered to and be the property of the said Alverson.

IN WITNESS WHEREOF the aforesaid parties have hereunto signed their names the date above written.

(Signed) J. L. ALVERSON.

HARRY H. KOEPER.

L. L. KOEPER. [22]

Exhibit "D" [to Complaint—Letter].

Spokane, Wash., Feb. 1, 1912.

Mr. J. L. Alverson,
Spokane, Wash.

Dear Sir:

Referring to the original contract dated May 15th, 1911, between ourselves and Messrs. Alverson & Koeper, and further referring to the release or assignment of this contract dated January 23, 1912.

It is our desire that you go ahead and complete all of the bridges between the Spokane River and Hangman Creek crossing of the O. W. R. & N. Co. and the eastern limits of our contract in accordance with the prices as set forth in the contract between Caughren, Boynton & Co. and Alverson & Koeper, dated May 15th, 1911. With the understanding that such work is dependable entirely upon the action of the O. W. R. & N. Co. as to the time that they may desire it done.

If this agreement is satisfactory to you will you kindly sign carbon copy of this letter attached and return to us.

Sincerely yours,

(Signed) CAUGHREN, BOYNTON & CO.

By SAM'L A. McCOY.

J. L. ALVERSON.

H. F. ALDRICH.

L.MOREL. [23]

Exhibit "E" [to Complaint—Arbitration Agreement].

ARBITRATION AGREEMENT.

WHEREAS, the parties hereto entered into a contract in writing dated the first day of June, 1911, whereby and by the terms whereof the party of the second part undertook and agreed to build and construct all concrete abutments and other structures on first party's line of railroad between the City of Spokane and Ayer Junction, as will more fully appear by said contract; and

WHEREAS, a portion of said work has been com-

pleted and a portion thereof remains at this date uncompleted; and

WHEREAS, certain controversies have arisen between said parties relative to the fair compensation to be received for portions of said work, and other matters, and it is desired that all said matters be settled and adjusted;

NOW, this agreement, made and entered into this 25th day of April, A. D. 1912, by and between the Oregon-Washington Railroad & Navigation Company, party of the first part, herein designated as the Railroad Company, and Caughren, Boynton & Company, parties of the second part, hereinafter designated as the Contractor, that all said matters in difference shall be settled and determined in the manner following, to wit:

First. The contractor shall be relieved of all obligation to do further work under the terms of said contract, at the crossing of said Railroad Company's line over the Snake River, and structures in connection therewith.

Second. The contractor shall be relieved of all obligation to build any structures under said contract, the construction of which has not at this date been commenced, unless within thirty days from the date of this contract the Railroad Company shall notify the contractor in writing of its election to have all structures except those at the Snake River completed under the terms of said [24] contract.

Third. All other structures and work shall be completed under the terms of the said contract.

Fourth. All other matters now unsettled under

the terms of said contract shall be submitted to arbitrators and settled by the award of arbitrators to be chosen in the following manner, to wit: The Railroad Company shall choose a competent engineer and the contractor shall choose a competent engineer, each of said engineers to be of recognized standing and ability, and to be selected outside the parties to this agreement, their partners, officers or present employees, and from among engineers of the Pacific Northwest.

In the event that said two arbitrators are unable to agree as to any matter to be determined under the terms hereof, they two shall agree upon and appoint a third engineer of like abilities and standing, who shall, with said two engineers, pass upon all such questions as have not been determined, the agreement of any two of said board of three to be decisive of any matter.

In the event that said two engineers cannot agree as to the third, then said third engineer shall be selected and appointed by the Federal Judge of the Northern District of the State of Washington.

Said arbitrators shall be paid in the following manner, to wit: Each party shall pay the arbitrator selected by it, and the parties shall each pay one-half of all other expenses, and said arbitrators shall have access at all times to all books, files, plans and other data of either of the parties hereto, in connection with the work under said contract and shall employ the necessary assistance in connection with their duties hereunder, and each of the parties to this agreement shall render all possible assistance

in connection with the determination of all matters hereunder.

Fifth. The basis of compensation for the work performed and now unsettled for under the terms of said contract, shall be as [25] follows:

All work performed at Snake River shall be paid for upon a force account basis, including a percentage to cover profit and superintendence by members of the contractor firm of 10%, said award upon said basis to be in full settlement of all claims in any manner arising out of said portion of the work to be performed under said contract.

In connection with said Snake River work the arbitrators shall determine the cost of all equipment secured for and used in connection with and now upon said work, and there shall be added to such cost a sum equal to 10% thereof. Said arbitrators shall also determine an amount which would be, in their judgment, the fair rental value of said equipment to the date of said award. Said arbitrators shall thereupon make an award covering the total cost of said work and furnish a copy thereof to the parties hereto, and within ten days after the receipt of a copy thereof, the Railroad Company shall elect which of said awards it will accept and shall notify the contractor in writing of its said election, and if it elects to accept the award including the cost of said equipment, title to said equipment shall thereupon pass to the Railroad Company; if it elects to accept the award including the rental of said equipment, title to said equipment shall remain in the contractor,

All payments heretofore made on account of said work at the Snake River shall be credited against the total cost thereof and final award shall be for the balance.

Said arbitrators shall determine the character of that certain structure known as the Kinch arch, and shall determine the treatment thereof in order that the same may conform to the requirements necessary in connection therewith, and shall determine the compensation to be made to the contractor on account thereof.

In event that the Railroad Company does not elect, within thirty days from the date hereof, to have the contractor complete [26] the structures, the construction of which has not at this date been commenced, then and in that event the Railroad Company shall assume all obligations of the contractor to the party or parties holding sub-contracts for the construction thereof, and said arbitrators shall determine the amount of profit which the contractor might reasonably have made upon said portions of said work, and make an award thereof, which shall be paid by the Railroad Company in consideration of the cancellation of said contract as to said work.

All other claims and matters in difference between the parties shall be submitted to said arbitrators and determined as speedily as possible.

Said arbitrators shall be at liberty to make separate awards as to any and all items submitted to them hereunder, and shall immediately notify the parties in writing of such awards, and the same shall

thereupon become due and payable and shall be promptly paid.

This agreement and all powers of the arbitrators hereunder shall remain in full force until all matters arising out of the contract between the parties hereto and referred to herein, shall be finally settled and determined, and full payment made to the contractor of all amounts due thereunder.

The awards made by the arbitrators hereunder shall be final, each party hereto hereby waiving the right to appeal therefrom.

IN WITNESS WHEREOF, the party of the first part has caused this agreement to be signed by its proper officers thereunto duly authorized, and the said second party has caused the same to be signed by a member of said contracting firm thereunto duly authorized, the day and year first above written.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY.

By _____

Attest: _____

[27]

CAUGHREN, BOYNTON & COMPANY.

By _____

[Endorsements]: Complaint. Filed in the U. S. District Court for the Eastern District of Washington. October 7, 1914. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [28]

*In the Superior Court of the State of Washington
in and for the County of Spokane.*

No. 2023.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation, and
J. A. CAUGHREN, CARLOS N. BOYNTON,
H. W. CHURCH, S. A. McCOY and MAR-
TIN WOLDSON, Copartners Doing Business
Under the Firm Name and Style of CAUGH-
REN, BOYNTON & COMPANY,

Defendants.

Order of Removal.

The petition of the Oregon-Washington Railroad & Navigation Company, one of the defendants above named, for the removal of said cause from this court to the District Court of the United States for the Eastern District of Washington, Northern Division, coming on regularly for hearing, and said defendant and petitioner having filed herein its said petition and presented to this court a good and sufficient bond properly conditioned, as required by law, and with sufficient surety; and it appearing that said action is a proper action for removal to the District Court of the United States for the Eastern District of Washington, Northern Division, and that said petitioner has presented its said petition for removal within the time and in the manner prescribed by

law, and that due notice has been given to the plaintiff herein of the time when said petition was to be presented to the Court;

Now, therefore, it is ordered and adjudged that said petition and the bond herein be, and the same are, hereby accepted, and said bond is hereby approved.

And it is further ordered that said Court proceed no further in said action, and that said action is hereby removed to the District Court of the United States for the Eastern District of Washington, Northern Division, and that the clerk of the court proceed [29] to make and prepare a transcript of the record in said cause as the same is now on file in his office.

Done in open court this 3d day of August, A. D. 1914.

(Signed) BRUCE BLAKE,
Judge.

Filed August 3, 1914, at 10:10 o'clock A. M.
Glenn B. Derbyshire, Clerk. By W. C. Steinmetz,
Deputy.

* [Endorsements]: Order of Removal. Filed in the U. S. District Court for the Eastern District of Washington, as a Part of the Transcript on Removal from State Court. August 31, 1914. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [30]

*In the District Court of the United States, for the
Eastern District of Washington, Northern Di-
vision.*

No. 2023.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation, and
J. A. CAUGHREN, CARLOS N. BOYNTON,
H. W. CHURCH, S. A. McCOY and MAR-
TIN WOLDSON, Copartners Doing Business
Under the Firm Name and Style of CAUGH-
REN, BOYNTON & COMPANY,

Defendants.

Order [Dismissing Cause as to Certain Defendants].

Upon the stipulation of the above-named plaintiff and the above-named defendants, excepting the Oregon-Washington Railroad & Navigation Company, a corporation, it is hereby

ORDERED that this cause be, and the same is hereby dismissed as to said defendants, J. S. Caughren, Carlos Boynton, H. W. Church, S. A. McCoy and Martin Woldson, copartners doing business under the firm name and style of Caughren, Boynton

Done in open court this 8th day of October, 1914.
& Company, without costs to either party.

(Signed) FRANK H. RUDKIN,

Judge.

[Endorsements]: Order Dismissing Certain Parties Defendant. Filed in the U. S. District Court for the Eastern District of Washington, October 8, 1914. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [31]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Defendant.

Amended Answer.

Comes now the defendant, Oregon-Washington Railroad & Navigation Company, and in answer to the complaint of the plaintiff herein, admits, denies and alleges, as follows:

I.

Admits the allegations contained in paragraph one (1) of plaintiff's complaint.

II.

Alleges that it has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph two (2) of said complaint, and therefore denies the same.

III.

Admits the allegations contained in paragraph three (3) of said complaint, except that the eastern

limits of the contract therein referred to were Post Street. Defendant denies that allegation and alleges that the eastern limits of said contract were the west line of Monroe Street in the city of Spokane.

IV.

Admits that Caughren, Boyton & Company entered into a contract with J. L. Alverson and L. L. Koeper, copartners, and that the copy of contract marked exhibit "A" was a copy of the contract so entered into, and denies each and every other allegation therein contained.

V. [32]

Alleges that it has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph five (5) of said complaint, and therefore denies the same.

VI.

Denies the allegations contained in paragraph six (6) of said complaint.

VII.

Alleges that it has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph seven (7) of said complaint, and therefore denies the same.

VIII.

Denies the allegations contained in paragraph eight (8) of said complaint.

IX.

Defendant admits that it entered into the contract designated as exhibit "E" in paragraph nine (9) of plaintiff's complaint, and denies each and every other allegation contained in said paragraph nine (9).

X.

Admits that it did not elect within thirty days from the date mentioned in said contract referred to in paragraph nine (9), to have the contractor complete the structure, as alleged in paragraph ten (10), and admits that it entered into a contract with contractors not connected with the plaintiff, or with Caughren, Boynton & Company as alleged in paragraph ten (10), but denies each and every other allegation therein contained.

XI.

Denies each and every allegation contained in paragraph eleven (11) of said complaint.

XII.

Admits that the plaintiff has not performed any of the work or furnished any of the materials as alleged in paragraph [33] twelve (12) of said complaint, and admits that said work has been completed by other contractors, and denies each and every other allegation therein contained, and alleges that plaintiff has not been damaged in the sum of \$71,750, as alleged in said paragraph twelve (12), nor in any sum whatsoever.

FIRST AFFIRMATIVE DEFENSE.

I.

For its first affirmative defense herein, the defendant alleges that it now is and at all times herein mentioned was a corporation organized under and by virtue of the laws of the State of Oregon, and authorized to do business within the State of Washington.

II.

That on or about the first day of June, A. D. 1911,

the Oregon-Washington Railroad & Navigation Company entered into a contract with the Caughren, Boynton & Company, a copartnership, composed of J. A. Caughren, Carlos M. Boynton, H. N. Church, S. A. McCoy and Martin Woldson, under which contract the said Caughren, Boynton & Company were to construct foundations, concrete abutments, piers, pedestals and culverts on the Oregon-Washington Railroad & Navigation Company's line near Ayer, Washington, to the west line of Monroe Street in the city of Spokane, Washington.

III.

That section 2 of said contract is as follows:

“The contractor for the consideration hereinafter provided, hereby agrees not to assign or transfer this contract, or re-let any of the said work in whole or in part, without the written consent of the Railroad Company or the Engineer, but shall constantly prosecute said work in person.”

IV.

That in violation of paragraph 2 of said contract, which paragraph is hereinabove fully set out, the said Caughren, Boynton & Company did, without the written consent of the Railroad Company, or the engineer, and without any consent whatever, thereto, sublet a portion of the said work provided in said contract, to plaintiff [34] herein as alleged in paragraph four of plaintiff's complaint.

V.

That the said subcontract between said Caughren, Boynton & Company, and the said J. L. Alverson and L. L. Koeper, was and is absolutely void by

reason of the failure of said Caughren, Boynton & Company to secure the consent of the defendant herein to said subcontract.

SECOND AFFIRMATIVE DEFENSE.

I. and II.

For its second affirmative defense herein, defendant reiterates the allegations contained in paragraphs one (1) and two (2) of its first affirmative defense, and makes the same a part hereof.

III.

That the plaintiff herein, and L. L. Koeper, entered into a subcontract with Caughren, Boynton & Company, for the construction of certain culverts, pedestals, piers, abutments and foundations on the Oregon-Washington Railroad & Navigation Company's line between Ayer, Washington, and the west line of Monroe Street, in the city of Spokane, Washington.

IV.

That under and by virtue of the terms of said agreement the plaintiff and his said partner, agreed to execute a bond in the sum of 25% of the estimated amount of the said contract, conditioned upon the faithful and satisfactory execution thereof in accordance with all of its terms, which provision is found in paragraph twelve (12) of said subcontract, copy of which is attached to plaintiff's complaint, made a part thereof, and marked exhibit "A."

V.

That said plaintiff failed to provide said bond in accordance with the terms of the contract herein-

above referred to and the same was never furnished to said contractor. [35]

THIRD AFFIRMATIVE DEFENSE.

I. and II.

For a third affirmative defense, defendant reiterates the allegations contained in paragraphs one (1) and two (2) of its first affirmative defense herein, and makes them a part hereof.

III.

That thereafter said Caughren, Boynton & Company entered into a subcontract with the plaintiff herein and L. L. Koeper, as copartners, which subcontract is fully set out in plaintiff's complaint by copy thereof, and marked exhibit "A."

IV.

That thereafter some differences arising between the defendant herein and the said contractors, Caughren, Boynton & Company, and agreement for the settlement of said differences was entered into, which agreement is set out in plaintiff's complaint, made a part thereof, and marked exhibit "E."

V.

That after the settlement or arbitration provided for in said agreement above referred to with said Caughren, Boynton & Company, was completed, plaintiff notified the defendant herein that it had a subcontract with the said Caughren, Boynton & Company, which said contract plaintiff claimed was as fully set out in exhibit "A" attached to plaintiff's complaint; that thereupon plaintiff claimed the right to perform the work provided in said subcontract.

VI.

That by the terms of said subcontract the plaintiff undertook to construct certain foundations, abutments, piers, pedestals and culverts on the Oregon-Washington Railroad & Navigation Company's line between Ayer, Washington, and the west line of Monroe Street, in the city of Spokane, Washington.

VII. [36]

That said defendant offered to have the work covered by said subcontract done by the plaintiff in accordance with the said subcontract, but plaintiff refused to do said work or any part thereof unless defendant would furnish the money necessary in order to enable said plaintiff to perform the said work covered by the said subcontract, and also furnish free to said plaintiff all necessary rock, gravel, sand and cement. This defendant refused to do.

VIII.

That plaintiff was at all times unable to do and carry on the work provided in his said subcontract on account of his inability to provide the means with which to carry on the said work.

IX.

That after the plaintiff had refused to do said work covered by the said subcontract hereinbefore referred to, the defendant was compelled to have said work performed by other parties than plaintiff.

WHEREFORE, defendant prays that plaintiff recover nothing herein, and that the defendant have judgment against the plaintiff for its costs and dis-

bursements provided by law.

(Signed) A. C. SPENCER and
HAMBLÉN & GILBERT,
Attorneys for Defendant.

State of Washington,
County of Spokane,—ss.

L. R. Hamblen, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant in the above-entitled cause, and makes this verification in its behalf; that he is duly authorized so to do; that he has read the foregoing amended answer, knows the contents thereof and that the same is true as he verily believes.

(Signed) L. R. HAMBLÉN. [37]

Subscribed and sworn to before me, this 17th day of February, 1915.

[Seal] (Signed) HUBERT P. SUING,
Notary Public, Residing at Spokane, Wash.

[Endorsements]: Amended Answer. Filed in the U. S. District Court for the Eastern District of Washington, February 18, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [38]

*In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.*

No. 2023.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Reply.

Comes now the above-named plaintiff, and replying to the affirmative matter pleaded as defenses in defendant's amended answer to plaintiff's complaint:

I.

Denies each and every allegation, matter and thing contained in the first affirmative defense, second affirmative defense and third affirmative defense, not expressly admitted to be true in plaintiff's complaint.

FURTHER REPLYING TO FIRST AFFIRMATIVE DEFENSE.

II.

Admits paragraph two of said first affirmative defense.

III.

As to paragraph three of said first affirmative defense, this plaintiff has no knowledge or information sufficient to form a belief as to the truth or falsity of

the matter contained in said paragraph three, and therefore denies the same.

IV.

As to the matters and things pleaded in paragraph four of said first affirmative defense, plaintiff has no knowledge or information sufficient to form a belief as to the truth or falsity thereof, and therefore denies the same.

V. [39]

Denies each and every allegation, matter and thing contained in paragraph five of said first affirmative defense.

Further replying to said first affirmative defense, plaintiff alleges:

1. That regardless of the provisions contained in the contract between defendant and Caughren, Boynton & Company with reference to any prohibition against assignment or subletting of said contract or any part thereof, that after said contract between defendant and said Caughren, Boynton & Company was executed and signed, that practically all of the work covered by said contract was sublet to various subcontractors, among which was plaintiff, with the knowledge, consent, acquiescence and approval of said defendant and their engineers in charge of said work; that thereafter, said defendant, during all of the time that said work was being carried on by said subcontractors of said Caughren, Boynton & Company, negotiated with, dealt with, gave orders to, and directed the work and duties of said subcontractors, including this plaintiff, and made no complaint with reference to any subletting

of contracts, and by defendant's acts of acquiescence and dealings with said subcontractors, paying their laborers, furnishing materials to them, giving orders and directions as to the performance of the work, and numerous other acts and things, all of which this plaintiff alleges constitutes a complete waiver of said clause in said contract prohibiting subletting of said work, without the written consent of said railroad company.

2. That after the contract referred to in plaintiff's complaint as having been entered into between him and Caughren, Boynton & Company was executed, and of which the defendant had knowledge and notice, it made no complaint on account of said subcontract having been given to this plaintiff, but acquiesced therein, and gave directions and orders to plaintiff with reference to said work, and caused him to establish his contracting outfit on the [40] company's grounds, at great expense, giving him orders to get ready to do the work referred to in plaintiff's complaint, for which plaintiff is now asking damages on account of being prevented from doing; that defendant caused plaintiff to incur great expense in making preparation to perform said work; that plaintiff did actually do part of said work with the approval of said company, said company knowing that plaintiff was doing so under and by virtue of said subcontract with Caughren, Boynton & Company, and that no written notice of consent of said railroad had been obtained from the company or its engineer in charge of the work. That in all of defendant's dealings with plaintiff, he was treated

by said company and its engineer as having a right to perform the work under said subcontract with Caughren, Boynton & Company, and that defendant wholly waived said provision against subletting, if any such provision was contained in the contract referred to in defendant's first affirmative defense.

3. That by reason of defendant inducing plaintiff to go to great expense in preparing to perform the work under said subcontract, in getting his contracting outfit on the company's ground and arranging for supplies, gravel, cement and other materials with which to perform said subcontract, and by reason of the fact that the engineer for said company, in charge of said work, impliedly held out to plaintiff, that he, plaintiff, had the right to perform said work as a subcontractor, and numerous other acts and things done by said defendant and its engineer, in inducing, inviting and influencing this plaintiff to do numerous acts and things in preparation for the performance of said work, under said subcontract referred to in plaintiff's complaint, plaintiff now says that defendants is, and ought to be estopped from now claiming that the subletting of said contract to plaintiff by Caughren, Boynton & Company, is void and in violation of section two of the contract executed between the said Caughren, Boynton & Company and defendant, [41] set out as a first affirmative defense in defendant's amended answer.

REPLYING TO THE SECOND AFFIRMATIVE DEFENSE.

I.

Admits paragraphs one and two thereof, but al-

leges that said contract extended to the west line of Post Street in the city of Spokane, instead of the west line of Monroe Street in said city.

II.

Admits each and every allegation, matter and thing contained in paragraphs three, four and five of said second affirmative defense, excepting that said contract extended to the west line of Post Street in the city of Spokane, instead of the west line of Monroe Street in said city.

III.

Further replying to said second affirmative defense, plaintiff alleges:

That none of the agreements referred to in said affirmative defense, which were made between Caughren, Boynton & Company and plaintiff and L. L. Koeper, were made or entered into for the benefit of this defendant, or pertaining to, or that it had any interest in the same; that the bond required by said contract was not for the benefit or protection of defendant; that it had no interest therein, and had no right to complain because said bond was not executed by the said subcontractor and original contractor; that it is wholly immaterial as to whether or not said subcontract contained such provision with reference to said bond.

IV.

Further answering said second affirmative defense, plaintiff alleges:

That said Caughren, Boynton & Company waived said provision in requiring a bond to be given to them by plaintiff and said Koeper, did not require

the same, but permitted plaintiff to do said [42] work just the same as though bond had been given, and acquiesced in all the plaintiff did in carrying out said subcontract, without any bond being executed; that regardless of the provisions of said contract, the custom was carried out continuously, that no bond should be given by any of the said subcontractors, and none were executed by any of the subcontractors with said Caughren, Boynton & Company, and in every case, said provision requiring bond was wholly waived by said Caughren, Boynton & Company.

REPLYING TO THE THIRD AFFIRMATIVE DEFENSE.

I.

Admits paragraphs three and four. As to paragraph five, plaintiff admits that he notified defendant that he had a subcontract with said Caughren, Boynton & Company, which said contract is fully set out as exhibit "A" in plaintiff's complaint, and plaintiff claimed the right to perform the work set out in said contract; plaintiff denies that said notice was given to defendant after arbitration was entered into, but long before said arbitration agreement was executed, carried out or signed, plaintiff informed defendant of his said subcontract with Caughren, Boynton & Company, and it at all times knew at the time said arbitration agreement was signed, that plaintiff's subcontract was the only one left on said work and that all other subcontractors had been settled with and their subcontracts completed, and that the provisions of said arbitration agreement applied

exclusively and wholly to this plaintiff, as well known to defendant at all times.

II.

Plaintiff admits paragraph six, excepting the words, "The west line of Monroe Street," and alleges that in lieu of said words, the fact is that said contract extended to the west line of Post Street, in the city of Spokane.

III.

Plaintiff denies each and every allegation, matter and [43] thing contained in paragraph seven of said third affirmative defense, pleaded in defendant's amended answer, excepting the words, "That defendant offered to have the work covered by said subcontract done by the plaintiff in accordance with the said subcontract," which excepted matter, plaintiff admits.

IV.

Plaintiff denies that he refused to do said work unless defendant would furnish the money necessary, in order to enable plaintiff to perform said work covered by said subcontract.

Denies that he required defendant to furnish to plaintiff the rock, gravel, sand or cement. Denies that defendant refused to furnish said materials.

V.

Further replying to said paragraph, plaintiff alleges:

That it was the custom, not only in the performance of the several contracts for railroad work referred to in the pleadings in this cause, but it is the universal custom with contractors and subcon-

tractors and railroad companies, that ninety per cent of the amount due each month, for any work performed by contractor or subcontractor, shall be paid to said contractor or subcontractor, and it was not necessary that said defendant company should finance plaintiff, or loan him the money to furnish gravel, sand, or anything else to enable plaintiff to perform his contract, or to finance the performance thereof.

VI.

That plaintiff alleges that he was financially able, at all times, to carry out and perform said contract, and ready and willing to perform it, but was held in abeyance by said defendant, and compelled to wait numerous months, with his outfit on his hands, getting ready to perform said work under the direction of the engineers of said defendant, all of which is well known to defendant, and acquiesced in, and approved by it. [44]

VII.

Denies each and every allegation, matter and thing contained in paragraph six of said third affirmative defense.

VIII.

Denies each and every allegation, matter and thing contained in paragraph seven of said third affirmative defense.

IX.

Denies that defendant was compelled to have said work performed by other parties than plaintiff. Denies that plaintiff ever refused to do said work, but was willing to do it at all times, and did not do

and perform said work for the reason that he was prevented from so doing by the acts of defendant hereinbefore pleaded in this reply and plaintiff's complaint.

X.

Further replying to the affirmative matter contained in defendant's amended answer, and several affirmative defenses, this plaintiff alleges:

1. That Caughren, Boynton & Company, who had the original contract for doing the work referred to in plaintiff's complaint, in conjunction with an amount of other construction work on said railroad line, never did, in person, nor as a copartnership, perform any of said work, nor did they perform anything in carrying out said work; that all of said work was sublet to subcontractors, one of which was this plaintiff. That no bond was ever taken from any of them, or required; that the defendant company dealt with, negotiated with, and aided in carrying out said work of said subcontractors, including plaintiff, knowing that no bond had been given by any of them, and knowing that the company nor its engineer had not consented in writing, that Caughren, Boynton & Company should sublet said work.

2. That after the execution of the arbitration agreement referred to in plaintiff's complaint as exhibit "E," and in which [45] arbitration agreement between Caughren, Boynton & Company and defendant it was agreed that defendant should assume all obligations of the contractors, and the party or parties holding subcontracts, and in pursuance thereto, this defendant, by

reason of the award made by the arbitrators provided in said arbitration agreement, paid to the said Caughren, Boynton & Company a large sum of money, the exact amount of which plaintiff is not exactly informed, but is informed and believes, and states that it was approximately five thousand dollars (\$5000), as and for the amount of profit which Caughren, Boynton & Company would have made on the work referred to in plaintiff's complaint, and which plaintiff was prevented from doing and performing by the said railroad company, notwithstanding the fact that said work had been let and given to other subcontractors by said railroad company, after plaintiff had been refused the opportunity of performing the same as hereinbefore alleged.

(Signed) PLUMMER & LAVIN and
JAMES Z. MOORE,
Attorneys for Plaintiff.

State of Washington,
County of Spokane,—ss.

J. L. Alverson, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action, had read the foregoing reply, knows the contents thereof, and that the same is true.

(Signed) J. L. ALVERSON.

Subscribed and sworn to before me this 23d day of February, 1915.

[Seal] (Signed) JOSEPH J. LAVIN,
Notary Public in and for the State of Washington,
residing at Spokane, Wash. [46]

[Endorsements]: Reply. Service admitted this 23d day of February, 1915. (Signed) Hamblen & Gilbert, Attorneys for Defendant. Filed in the U. S. District Court for the Eastern District of Washington, February 25, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [47]

*In the Distrcit Court of the United States for the
Eastern District of Washington, Northern Di-
vision.*

No. 2023.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the defendant.

(Signed) W. H. DIBBLE,
Foreman.

[Endorsements]: Verdict. Filed April 23, 1915.
W. H. Hare, Clerk. [48]

*In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.*

No. 2023.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

**Stipulation [Allowing Plaintiff 30 Days to File
Exceptions to Instructions, etc.].**

It is hereby stipulated and agreed by the parties hereto, by their respective counsel, that plaintiff may have thirty days in which to take and file exceptions to the Court's instructions, and for the preparation and service of a bill of exceptions in the above entitled case.

(Signed) PLUMMER & LAVIN and
J. Z. MOORE,

Attorneys for Plaintiff.

A. C. SPENCER and
HAMBLIN & GILBERT,

Attorneys for Defendant.

[Endorsements]: Stipulation extending Time for filing Exceptions to Instructions. Filed in the U. S. District Court for the Eastern District of Washington. May 1, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [49]

*In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.*

No. 2023.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Motion for New Trial.

Comes now the above-named plaintiff and moves this Court to set aside the verdict of the jury heretofore rendered in this cause, to vacate the judgment entered thereon, and to grant a new trial of said cause upon the following grounds, to wit:

Errors in law occurring at the trial.

The particular errors realized upon by your petitioner are as follows:

I.

That the Court erred in instructing the jury as follows:

“I mention this for the reason that a contract between the defendant and Caughren, Boynton & Company has been received in evidence to assist in determining the subject matter and limits of the work contemplated in the Alverson-Koeper contract, exhibit ‘A’; that said Caughren, Boynton & Company contract with the railroad company was received for no other purpose, and its terms and

provisions are not to be considered by you except as instructed by the Court.”

II.

That the Court erred in instructing the jury as follows:

“I charge you in this connection that the contract exhibit ‘A’, under which plaintiff claims in this case, does not require the railroad company to furnish sand without cost to plaintiff, and if you find from the evidence, that the plaintiff imposed that condition upon the defendant, then the plaintiff in effect breached and abandoned the contract, and under such circumstances you should find for the defendant.”

III.

That the Court erred in instructing the jury as follows:

“If you find that the plaintiff imposed and demanded, as a condition for the performance of the work, that the defendant furnished gravel without cost to the plaintiff upon the work to be [50] done under the contract exhibit ‘A,’ then you should find for the defendant.”

IV.

That the Court erred in instructing the jury as follows:

“If you find that the plaintiff required and demanded as a condition for the performance of the contract that the railroad company finance the plaintiff, then I charge you in making such demand and imposing such condition, if you find the same was made by the plaintiff, then contract became

thereby abandoned and breached by the plaintiff, and defendant was excused from the performance of the said contract by it, and your verdict should be for the defendant.”

V.

That the Court erred in instructing the jury as follows:

“The contract is somewhat indefinite as to its eastern limits. One party contends that the contract extends only to the Monroe Street Bridge crossing the Spokane River. The other side contends that it extends to Station 24, at or in the vicinity of Post Street, east of the Spokane River. In other words, gentlemen of the jury, the plaintiff contends that his contract covered the piers and other construction work north of the Spokane River and east of the Monroe Street Bridge. The defendant contends that it did not cover or include this work. That will be one of the questions you will be called upon to determine. If you find from the preponderance of the testimony that the contract did extend to and include the work beyond, or on the east side of the Monroe Street Bridge, you will take that work into consideration in assessing the amount of the recovery. And if, on the other hand, you are not satisfied that that work was included in plaintiff’s contract you will exclude that part of the work from your consideration entirely in your deliberations.”

VI.

That the Court erred in instructing the jury as follows:

“Mr. SPENCER.—I would ask Your Honor to instruct the jury that in the event they find that the plaintiff exacted the requirement for the furnishing of sand and gravel without cost to the plaintiff, or that he exacted the condition of financing, as instructed by Your Honor, then in either of said contingencies, they are not required to find upon the special findings which Your Honor has submitted.

The COURT.—Oh, yes.”

VII.

That the Court erred in submitting the question to the jury as to whether or not the plaintiff had abandoned his contract.

VIII.

That the Court erred in submitting to the jury the question as to whether or not plaintiff had, himself, breached his [51] contract.

(Signed) JAMES Z. MOORE, and

PLUMMER & LAVIN,

Attorneys for Plaintiff.

[Endorsements]: Motion for New Trial. Service admitted this 21st day of May, 1915. (Signed) Hamblen & Gilbert, Attorney for Defendant. Filed in the U. S. District Court for the Eastern District of Washington. May 21, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [52]

*In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.*

No. 2023.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Order Denying Motion for New Trial.

Plaintiff's motion for a new trial coming on regularly for hearing on the 21st day of June, 1915, and plaintiff appearing by his attorneys Messrs, Plummer & Lavin, and defendant appearing by its attorneys, Hamblen & Gilbert, and the matter having been fully argued and the court being fully advised;

Now, therefore, it is ordered, that said motion be and the same hereby is denied.

Done in open court this —— day of June, 1915.

(Signed) FRANK H. RUDKIN,

Judge.

[Endorsements]: Order Denying Motion for New Trial. Filed June 23, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [53]

*In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.*

No. 2023.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Judgment.

This cause having come on for trial on the 19th day of April, A. D. 1915, and the plaintiff having appeared in person and by his attorneys, Messrs. Plummer & Lavin, and Judge J. Z. Moore, and the defendant (appearing by its attorneys, Mr. A. C. Spencer and Messrs. Hamblen & Gilbert, and a jury having been empanelled and sworn to try said cause, and the plaintiff and the defendant having introduced evidence in said cause, and the Court having instructed said jury and said jury having considered said cause and returned a verdict in court in favor of the defendant, and said verdict having been regularly filed in the records of said cause, and the plaintiff having presented his motion for a new trial and his motion having been heard by the Court and denied, and the Court being fully advised in the premises;

Now, therefore, it is ORDERED and ADJUDGED, that the plaintiff have and take nothing by his action, and that the defendant have and re-

cover judgment against the plaintiff for its costs and disbursements herein.

Done in open court this 21st day of June, 1915.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorements]: Judgment. Filed in the U. S. District Court. June 21, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [54]

*In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.*

No. 2023.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

**Order [Extending Time to June 13, 1915, to Prepare
Bill of Exceptions].**

It is ordered that the time for preparing and serving bill of exceptions in the above-entitled cause be and the same is hereby extended until and including the 13th day of June, 1915.

Done this 20th day of May, 1915.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Extending Time for Preparing and Serving Bill of Exceptions. Filed in the U. S. District Court for the Eastern District of

Washington, May 24, 1915. W. H. Hare, Clerk.
By S. M. Russell, Deputy. [55]

*In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.*

No. 2023.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

**Order [Extending Time to July 1, 1915, to Settle
of Exceptions, etc.].**

Upon motion of defendant and for good cause
shown,

It is hereby ORDERED that the time for settling
the bill of exceptions proposed by plaintiff herein,
and within which the defendant may file objections
to said bill of exceptions and propose amendments
thereto, be and the same is hereby extended to July
1, 1915.

Ordered this 31st day of May, A. D. 1915.

(Signed) JEREMIAH NETERER,

Judge.

[Endorsements]: Order Granting Extension of
Time to Settle Bill of Exceptions. Filed in the U.
S. District Court for the Eastern District of Wash-
ington, June 2, 1915. W. H. Hare, Clerk. By S. M.
Russell, Deputy. [56]

*In the District Court of the United States for the
Eastern District of Washington, Northern Divi-
sion.*

No. 2023.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAV-
GATION COMPANY, a Corporation,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED: That on, to wit, the 19th day of April, 1915, the above cause came on for trial before the Honorable Frank H. Rudkin, Judge of the above-entitled court, and a jury, upon the issues raised by the pleadings, Plummer & Lavin and J. Z Moore appearing as attorneys for plaintiff, and Hamblen & Gilbert and A. C. Spencer appearing as attorneys for defendant. The jury was then called and sworn to try the cause, whereupon the respective parties made their opening statements, and thereafter the following evidence was adduced and proceedings had.

[Testimony of J. L. Alverson, the Plaintiff.]

J. L. ALVERSON, being duly sworn, testified as follows:

I am the plaintiff in the above-entitled cause, and on the 15th day of May, 1911, the contract marked "Plaintiff's Exhibit 18," a copy of which is attached to the complaint in this action, and identified as

(Testimony of J. L. Alverson.)

exhibit "A" thereto, was executed by Caughren, Boynton & Company and J. L. Alverson and L. L. Koeper.

(Which contract was offered in evidence and duly admitted without objection, whereupon and thereafter contract marked "Plaintiff's Exhibit 1" was duly admitted in evidence without objection, and thereafter the contract marked "Plaintiff's Exhibit 19" was duly admitted in evidence without objection, and thereafter the paper marked "Plaintiff's Exhibit 21" was duly admitted in evidence without objection, which is, and was as follows:

[Plaintiff's Exhibit No. 21—Letter, February 1, 1912.]

"Spokane, Washington, Feb. 1, 1912. [57]

Mr. J. L. Alverson,
Spokane, Wash.

Dear Sir:

Referring to the original contract dated May 15th, 1911, between ourselves and Messrs. Alverson & Koeper and further referring to the release or assignment of this contract dated Jan. 23d, 1912. It is our desire that you go ahead and complete all of the bridges between the Spokane River and Hangman Creek crossing of the O.-W. R. & N. Co., and the eastern limits of our contract in accordance with the prices as set forth in the contract between Caughren, Boynton & Company and Alverson & Koeper, dated May 15th, 1911. With the understanding that such work is dependable entirely upon

(Testimony of J. L. Alverson.)

the action of the O.-W. R. & N. Co. as to the time they desire it done.

If this agreement is satisfactory to you will you kindly sign carbon copy of this letter attached and return to us.

Sincerely yours,

CAUGHREN, BOYNTON & CO.,

By SAM'L A. McCOY.

H. F. ALDRICH.

L. WOREL.

J. L. ALVERSON."

That thereafter "Plaintiff's Exhibit," being the arbitration agreement, was duly admitted in evidence without objection.)

WITNESS, continuing his testimony, testified as follows: The contract which Caughren, Boynton & Company had with the railroad company, covered, according to my understanding, all of the concrete work between Station 24, being a point immediately east of the Spokane River Bridge to the east end of the long bridge crossing the Spokane River and Hangman Creek, and the subcontract which I had from Caughren, Boynton & Company covered the same work, and included all of the foundations, piers, pedestals, abutments and retaining walls, being part of the construction of the roadbed of the defendant between the points which I have mentioned. The reason I know this is that I was taken out on the work by the assistant engineer of the defendant, under the direction and order of F. L. Pittman, chief engineer in charge of the work and he showed me the work and pointed out that it covered all of

(Testimony of J. L. Alverson.)

the work between Station 24 and Hangman Creek Bridge. Pittman also indicated upon the ground for me the places for depositing gravel most convenient to the work. I was informed by Mr. Pittman, chief engineer, that he could not tell exactly when the work would be ready to be done, but he said he would advise me. He said the [58] plans were not all completed yet, or gave some other reason which I disremember, but said I would be informed in due time and allowed to go ahead with my subcontract. Pittman knew I had a subcontract with Caughren, Boynton & Company, as we often talked the matter over, and he gave me instructions to bring my outfit over and locate it near the work, so as to be prepared to go ahead as soon as the company was ready.

The offices of the company and Mr. Pittman were in the Paulsen Building, Spokane, where this work was to be performed, crossing the Spokane River and extending to Hangman Creek Bridge. I brought my outfit over and located it on the ground, and from time to time received instructions from Mr. Pittman about locating my outfit along the work, and other instructions in regard to going ahead with the performance of the work which I have mentioned. I was present in the offices of the company and of Caughren, Boynton & Company before the arbitration agreement (Plaintiff's Exhibit 17) was signed, and my interests and rights were talked over at different times between all of the parties, and I was the only subcontractor under Caughren, Boyn-

(Testimony of J. L. Alverson.)

ton & Company at the time said arbitration agreement was signed or discussed, and the following clause, to wit: "In the event that the railroad company does not elect, within thirty days from the date hereof, to have the contractor complete the structures, the construction of which have not at this date been commenced, then and in that event the railroad company shall assume all obligations of the contractor to the party or parties holding sub-contracts for the construction thereof," was inserted in said arbitration agreement for my benefit. I talked with Mr. Pittman frequently, after the arbitration agreement was signed, and he invariably informed me I was to have the work, and to go ahead with the work when they were ready to have it performed. They kept me waiting around for over a year, with my outfit, and I called numerous times, I cannot tell just how many, but every week [59] or so, I would inquire about when the work would be ready, and was always told by Mr. Pittman that they were getting ready as fast as possible, and I would be informed in due time, so I could go ahead with the work. I had plenty of means with which to finance myself in the performance of said work, and was ready, willing and able to do said work at all times, and to carry out said work according to my contract and according to the plans and specifications of the company and the original contract between the railroad company and Caughren, Boynton & Company. I waited around a number of

(Testimony of J. L. Alverson.)

months, and then I had some work up in Canada I could do, so I moved part of my outfit up there, but kept in communication with Mr. Pittman through my father-in-law, Mr. J. Z. Moore, and was ready to come down and go right to work on the contract, when I was informed that the work was ready. A number of months afterwards, Mr. Pittman was replaced as chief engineer in charge of the work by Mr. Holman, and the company, without consulting me, or making any arrangements with me, let the work to be done by contract to Twohy Brothers, and have never settled with me, or considered me at all in any manner, and have never done anything by way of carrying out the terms of the arbitration agreement, or carying out any obligations of the original contractor, Caughren, Boynton & Company, to me, but have wholly disregarded my contract and rights in the matter, and have paid me nothing and have made no adjustment of my claim whatever.

I was expecting to go to work to perform my contract for the company at all times, until I found out the contract had been relet to Twohy Brothers, and they went ahead and did the work through their subcontractors, Bates & Rogers Construction Company.

I have examined the plans and specifications and know the cost of all materials which I was required to furnish in order to perform the work, and considering what the work would have cost me to have performed, my profits on said work, if I had been

(Testimony of J. L. Alverson.)

permitted to carry out my contract, would have been \$90,244.31, which included [60] the retaining walls, foundations, abutments piers and pedestals between Station 24 and Hangman Creek Bridge.

If the retaining walls are excluded, my profits would have been \$78,145.08.

If the limits of the contract are to be considered as meaning from Monroe Street to the Hangman Creek Bridge and the retaining walls are included, my profits would have been \$60,218.89, and if the retaining walls are excluded between these last two mentioned points, my profits would have been \$48,119.66.

Mr. Pittman, chief engineer, knew at all times that I was waiting and ready at all times to perform my subcontract, and I had no notice of the intention on the part of the railroad company to deprive me of said work under my said contract, until the work had been relet to Twohy Brothers. Pittman assured me at all times, that I was to have the work, both before the arbitration agreement was signed and at all times afterwards, and I never at any time imposed conditions, or insisted that the company should do anything to permit me to perform my subcontract, and I would have started to work and performed the contract at any time I was notified to do so by the company, or whenever said work was ready to be performed, and I made all arrangements so to do.

I had performed other subcontracts, just the same as the contract in question, for the building of parts of this same railroad line between Spokane and

(Testimony of J. L. Alverson.)

Marshall Junction, under Caughren, Boynton & Company, and had never failed, neglected or refused, at any time, to perform this subcontract in question, according to its terms.

Cross-examination of Plaintiff by Mr. SPENCER.

Q. You went to Canada in 1912?

A. I think it was in June, 1912.

Q. In June, 1912; and did you take any of your outfit with you? [61]

A. Yes; we took what stuff we had here.

Q. And you had dissolved with Mr. Koeper when you went to Canada?

A. Oh, yes; dissolved six or eight months before that. Well, it was practically dissolved in September, 1911, after we had finished those culverts down there.

Q. Then, when you came back from Canada, that was in the fall of 1912? A. Yes, sir.

Q. Or, in the winter of 1913, after the first of the year, or do you remember?

A. Oh, we got back I think along the latter part of November, when we closed our work there, about the 10th of November, in Canada.

Q. Then, you saw Mr. Pittman several times, and finally you saw Mr. Holman?

A. I think I saw Mr. Holman, that is the spring of 1913, although I am not sure; I made so many trips over there that I can't say definitely.

Q. You didn't make many trips to see Mr. Holman, did you?

A. No, I saw him twice, I think.

(Testimony of J. L. Alverson.)

Q. You saw him at his office there with his assistant, Mr. Isaacs, in the spring of 1913, didn't you?

A. I think so.

Q. Now, at that time, didn't you discuss this contract with him, and say to him—that in substance—that the railroad company would have to finance you if you were going to do that job; that it was a big job, and they would have to furnish you the sand, gravel and cement?

A. No, sir; I had no such conversation at all.

Q. At any time with Holman?

A. Not along those lines about furnishing cement. Nothing [62] was ever said about cement.

Q. And nothing was said about gravel or sand?

A. Yes; I think that matter came up. That was our contract; they were to furnish sand and gravel all along the line.

Q. You had been furnished it?

A. Yes, that was in our contract, to be furnished sand and gravel.

Mr. PLUMMER.—Who furnished it?

A. The railroad company; it was furnished by either the railroad company or the general contractor. It cost us nothing.

Mr. SPENCER.—Q. And you insisted that was your right with respect to this work?

A. Yes, sir, under the arbitration agreement, which read that they would assume all the responsibility of the general contractor to us.

Q. I am not asking you what the arbitration agreement provides; but that was the substance of

(Testimony of J. L. Alverson.)

your conversation with Mr. Holman?

A. No, we talked the matter over, and I told him that we wanted to do the work according to the arbitration agreement.

Q. You didn't tell him that you wanted to do it according to the contract of Alverson & Koeper?

A. I said according to the arbitration agreement, which took care of us.

Q. Well, didn't you claim that under the arbitration agreement, and under this Alverson & Koeper contract, that the railroad company would have to furnish you sand, gravel and cement? A. No, sir.

Q. But you did tell him that they would have to furnish you the sand and gravel?

A. Yes; I said—

Q. And you did tell him, did you not, that as a condition [63] of your going on with the work that they would have to finance you?

A. I said we would expect to do the work under the terms of the arbitration agreement. He said, "What do you mean?" "Well," I said, "the general contractor financed me, and you are assuming his obligations; therefore, you would have to finance me. If we wanted machinery we bought through them, or if we wanted supplies, we bought through them."

Q. Then, you left, and how long was it before you saw him again?

A. I think it was the fall of 1913, or the winter of 1913, rather.

Q. How is that?

(Testimony of J. L. Alverson.)

A. About the middle of the winter some time.

Q. Well, this first talk you said was in the early spring of 1913, you said?

A. Yes, before I went north. Now, I think that is the date. Now, I am not positive about that.

Q. Then on another occasion you conferred with him, and you took the same position, did you not, that he would have to finance you and give you cement, or rather sand and gravel?

A. Yes, sir. Mr. Moore and I saw him—Lawson Moore and I say Mr. Holman, I think, in the winter of 1913.

Q. Who? A. Lawson Moore.

Q. Is that Judge Moore's son?

A. Yes, sir; associated with me in this work.

Q. What time was that?

A. That was in the winter of 1913, late winter.

Q. Was that after the first conference, or after—

A. No, this was afterwards.

Q. But the first conversation you say was in the late winter or very early spring of 1913? [64]

A. 1913, I think; and the next one was in the late fall of 1913. It might have been after Christmas or before Christmas, I don't remember the date exactly.

Q. Well, that was substantially to the same effect, wasn't it?

A. Mr. Moore and I were up there and made the same statement; that we expected—Mr. Holman said, "How do you figure that?" The conversation came around to the arbitration agreement, and

(Testimony of J. L. Alverson.)

said we figured we would be financed by the railroad company. But at that time the work was practically all done.

Q. This concrete work wasn't done until 1914?

This concrete work wasn't let until 1913?

A. I don't know when it was let.

Q. You remember that in the summer it was let to Twohy Brothers?

A. It wasn't here at the time it was let.

Q. Where were you in 1913? A. Canada.

Q. When did you go back to Canada?

A. I went back the 10th of March, 1913.

Q. How long did you stay there?

A. I stayed there until about the 1st of December—about the 10th of December.

Q. And you had this talk with Mr. Holman before you went back to Canada on the 10th of March?

A. I think that was the time, yes, sir.

Q. Just about the time you left?

A. It probably was; still, I don't know just about that date, but I am pretty positive that was the time.

Q. Well, it couldn't be very far out of the way?

A. No.

Q. If you left on the 10th of March, 1913—you think that [65] is the date you went to Canada?

A. Yes, sir; I know that date.

Q. You had your outfit up there? A. Yes, sir.

Q. And how long did you stay there?

A. I got down from there about the 10th of December, I think; about that time, the first of December.

(Testimony of J. L. Alverson.)

Q. 1914? A. No, 1913.

Q. Oh, yes, 1913, sure. And then when you got back you found the work was well under way?

A. Yes, sir.

Q. But the work, however, west of—that is some of the concrete abutments here, Nettleton and Oak and some of these other abutments were not completed then, were they?

A. I don't remember whether they were or not. I know they commenced at the time I talked to Mr. Holman; all that stuff down there was practically done.

Q. Well, wasn't there two or three abutments down there, and didn't Holman tell you you could build those, and that you said you wouldn't build them unless he would finance you and furnish you the gravel and the sand?

A. No. He asked us how we would like to build Cedar St.; that was the one that was left. He said they had one left. I told him all right, I would like to build it. He said, "When can you start?" I said, "Any time." Mr. Moore—I don't know how this thing came up about this arbitration agreement again, but we said we would expect to build it under the terms of the arbitration agreement. He said, "You mean by that we are to finance you?" And I don't know whether he mentioned sand and gravel or not, and I told him yes. [66]

Q. Well, that is what you understood that those three elements were in controversy there?

A. Sand and gravel and financing. Yes, sir.

(Testimony of J. L. Alverson.)

Q. What work were you doing in Canada with your outfit up there?

A. We had some reinforced concrete work and we had some grading.

Q. By "we" whom do you mean?

A. Mr. Moore and I; Lawson Moore.

Q. Well, was he interested in this? When this contract here was turned over to you again, was he interested in that? A. Yes.

Redirect Examination by Mr. PLUMMER.

Q. When you took this outfit up into Canada that you had previously placed on this ground preparatory to doing this work in controversy at the request or direction of Mr. Pittman, state whether or not you still had an outfit down here that you could use for that purpose? A. Yes, sir.

Q. To perform this work so that you wouldn't have to come back from Canada with your outfit?

A. There was lots of concrete outfits here in town at that time that we could have gotten on a day's notice; outfits stored all around.

Q. And in case he gave you directions to go ahead with this work, you intended to get this outfit—

Mr. SPENCER.—We object.

Mr. PLUMMER.—Just state what you proposed to do this work with in case you were called upon to do the work while your outfit was in Canada.

A. Get an outfit here.

Mr. PLUMMER.—Q. Was it necessary at all in order for you [67] to perform this contract that is in controversy here that you should be financed

(Testimony of J. L. Alverson.)

by the railroad company in order to permit of your doing it?

Mr. SPENCER.—That is quite immaterial, if the Court pleases.

Mr. PLUMMER.—No, they brought that out, that he wanted to be financed.

Mr. SPENCER.—He says that is a condition he imposed. I don't care whether it was necessary or not. He said on those two occasions he told Mr. Holman that under the arbitration agreement he expected to be furnished with sand and gravel.

Mr. PLUMMER.—He didn't say it was a condition precedent to it.

The COURT.—That is for the jury.

Mr. PLUMMER.—Will you answer the question?

A. No.

The COURT.—That will go to his ability to perform it; that is all.

Mr. SPENCER.—Does the Court permit the testimony as to whether it was necessary for him to be financed?

The COURT.—The question is whether he was able to perform the contract without being financed. I will permit him to answer that question.

Mr. SPENCER.—Note an exception.

A. Yes, sir.

Mr. PLUMMER.—As a matter of fact, Mr. Alverson, the contract itself provides for the payment of ninety per cent upon estimates furnished each thirty days.

Mr. SPENCER.—That shows for itself.

(Testimony of J. L. Alverson.)

The COURT.—The contract speaks for itself, Mr. Plummer.

Mr. PLUMMER.—All right. That is right. I will ask you what financing would be necessary to enable you to go ahead with this work? How much money would it take? [68]

Mr. SPENCER.—That is objected to as immaterial.

The COURT.—That goes to his ability to perform the contract.

Mr. SPENCER.—Exception.

A. It wouldn't have taken a large amount of money to start the work. You see the contract provides estimates of ninety per cent of the amount of the work you have done each month, and that is coming back, ninety per cent of it.

Mr. PLUMMER.—State whether or not you could have raised money sufficient to go ahead with the work, and was ready to do it at any and all times under your contract?

A. Yes, sir.

Mr. SPENCER.—Objected to as immaterial and irrelevant and note an exception.

Recross-examination by Mr. SPENCER.

Q. You want to be understood as telling this jury here that you could go down here and build these structures in this Spokane River, assemble the outfit to do it, build the forms and the towers, place the derricks that are necessary and do all the bracing that is required in sinking those pits over there where these piers are by the pen stocks of the power

(Testimony of J. L. Alverson.)

company, and that you can carry out an enterprise of that magnitude and in that location, and do it without capital and without an outfit?

A. I don't mean that at all, sir.

Q. You mean to say that you would assemble an outfit over night, or get an outfit over night to do it?

A. I don't say that.

Q. You don't wish to be understood that way?

A. Absolutely not.

Q. Do you say that you could do it without capital? A. No, sir.

Q. It would require a very substantial amount of money to do it? [69]

A. It would require money to do it, yes.

Q. I think that is all.

Mr. PLUMMER.—I believe you said yesterday that you told Mr. Holman that Coughren, Boynton & Company had agreed to finance you, provided you called upon them to do so. Did you make that statement to him?

A. Yes, sir; I told him we had been financed by them on some of the work; and on some of the work, we had not been.

Q. What arrangements or agreements had Coughren, Boynton & Company made with you with reference to financing you should you call upon them to do so?

Mr. SPENCER.—I object to that, Your Honor, as immaterial. They have pleaded a contract here, and say that we assumed it.

Mr. PLUMMER.—We don't say that you as-

(Testimony of J. L. Alverson.)

sumed that altogether. We say that you assumed all obligations to the subcontractor. Now, if there is an obligation existing between Caughren, Boynton & Company themselves and the subcontractors with reference to financing, that is one obligation, the same as any other obligation of the contract. It may be oral, but it is an obligation just the same.

The COURT.—The written contract provides just what they shall do.

Mr. PLUMMER.—Yes, but independent of that there could be another contract, which don't conflict with the provision for financing them.

The COURT.—If it was entered into subsequently, and upon a new consideration, it might be held to be a contract.

Mr. SPENCER.—They have pleaded this written contract, Your Honor, and brought the issue in here on the written contract.

Mr. PLUMMER.—You say in your arbitration agreement that you are to assume all obligations. You don't confine it to the contract between Caughren, Boynton & Company and Alverson.

The COURT.—There is no claim here that there is any [70] agreement between the plaintiff and Caughren, Boynton & Company, other than the contract set forth, as I read the pleadings.

Mr. PLUMMER.—No; there is no special contract pleaded. This other contract is simply pleaded by way of recital, showing his right to do the work, and his right to the profits in it.

The COURT.—The only obligations you impose

(Testimony of J. L. Alverson.)

on the defendant by these pleadings is this written contract, which you allege was assumed by them.

Mr. PLUMMER.—All right.

The COURT.—I will sustain the objection.

Mr. PLUMMER.—The sand and gravel that you were to use on this job that we speak of, where was that to come from? Where were you going to get them?

A. They were to be furnished.

Q. Who by?

A. By either the railroad company, or the general contractor.

Mr. PLUMMER.—Now, Mr. Alverson, I will ask you if you have gone over these maps, specifications and other data that has been offered in evidence here to ascertain what would have been the cost of your doing this work in controversy, and also what would have been your profit on the work if you had been allowed to do it? Have you gone over these details with the engineers? A. Yes, sir.

[Testimony of James Z. Moore, for Plaintiff.]

JAMES Z. MOORE, produced on the part of the plaintiff, being first duly sworn, testified as follows:

I am the father-in-law of the plaintiff, J. L. Alverson. When Alverson went to Canada to do some work there, he instructed me to confer frequently with Mr. Pittman, the chief engineer of the defendant, as to when the work, which is the subject matter of this controversy, would be ready to be performed by Alverson under his contract, and that

(Testimony of James Z. Moore.)

immediately upon receiving notice, he would come [71] down and go ahead with the contract. In pursuance with said request on the part of Alverson, I called frequently at the offices of the company and conferred with Mr. Pittman, the chief engineer. Mr. Pittman informed me at all times that Alverson was to go ahead with the work when they were ready; that he could not tell just when the work would be ready, but that he would let me know so I could inform Alverson. I made these visits to Mr. Pittman and conferred with him every few days during all of the time Alverson was in Canada.

Alverson was ready, willing and able to perform said work at any and all times, and had made preparations to commence work as soon as notified by the company that said work was ready. I kept in correspondence with Alverson, informing him what Mr. Pittman had told me upon the subject.

The plaintiff introduced testimony of engineers Kennedy and Tannatt, who testified that they had gone over the plans and specifications of the work, and corroborated plaintiff, Alverson, as to his profits, had he been allowed to do the work.

The defendant thereafter introduced evidence which tended to dispute the evidence of the plaintiff and his witness, as to any loss of profits, which witnesses for defendant testified in substance that if Alverson had been permitted to do such work, when he was done, he would have sustained a loss of his contract, rather than a profit. The defendant introduced testimony tending to show that said

engineer Pittman retired from the control of the Spokane Terminal work of the defendant company, with the close of the year 1912, and that he had no jurisdiction or authority over said work, including the work in controversy after January 1, 1913, and the defendant also introduced evidence tending to show that on and after January 1, 1913, J. R. Holman, referred to by the plaintiff in his testimony, was in exclusive charge of said Spokane Terminal work [72] of the defendant, including the work in controversy in this case, as Chief Engineer of the defendant, and the defendant introduced upon said trial further evidence tending to show that the work in controversy in this action was undertaken and commenced by Bates & Rogers in the month of July, 1913.

Thereafter, the Court instructed the jury, and among others, gave the following instructions

Instructions of the Court.

The plaintiff in this case is limited to the terms and provisions of the contract attached to the complaint as exhibit "A," and the terms and provisions of said contract are not to be modified, added to or detracted from by reference to any other contract or exhibit introduced in this cause. I mention this for the reason that a contract between the defendant and Caughren, Boynton & Company has been received in evidence to assist in determining the subject matter and limits of the work contemplated in the Alverson—Koeper contract, exhibit "A"; that said Caughren, Boynton & Company contract with the railroad company was received for no other

purpose, and its terms and provisions should not be considered by you except as instructed by the Court.

Referring to the work called for by the so-called subcontract, a copy of which is attached to the complaint as exhibit "A," it is admitted by both parties to this cause that defendant offered to have the work covered by said subcontract done by the plaintiff in accordance with the said subcontract; and in this connection the defendant contends that in the spring of 1913, the plaintiff had a conference with Mr. J. R. Holman, chief engineer of the defendant, and representing the defendant in this case, and that in discussing said work and said subcontract the plaintiff imposed upon the defendant the requirements to furnish sand and gravel without cost to the plaintiff to be used upon the work, and that the defendant would also be required to finance the plaintiff in the work. I [73] charge you in this connection, that the contract, exhibit "A," under which the plaintiff claims in this case, does not require the railroad company to furnish sand without cost to the plaintiff, and if you find from the evidence that the plaintiff imposed that condition upon the defendant, then the plaintiff in effect breached and abandoned the contract, and under such circumstances you should find for the defendant.

If you find that the plaintiff imposed and demanded as a condition for the prosecution and performance of the work that the defendant furnish gravel without cost to the plaintiff upon the work to be done under the contract exhibit "A," then you should find for the defendant.

If you find that the plaintiff required and demanded as a condition for the prosecution and performance of the contract that the railroad company finance the plaintiff, then I charge you that in making such demand and imposing such condition, if you find that the same was made by the plaintiff, the contract became thereby abandoned and breached by the plaintiff, and the defendant was excused from the performance of the said contract by it, and your verdict should be for the defendant.

The contract is somewhat indefinite as to its eastern limits. One party contends that the contract extends only to the Monroe Street Bridge across the Spokane River. The other side contends that it extends to Station 24, at or near the vicinity of Post Street, east of the Spokane River. In other words, Gentlemen of the Jury, the plaintiff contends that his contract covered the piers and other construction work north of the Spokane River, and east of the Monroe Street Bridge. The defendant contends that it did not cover or include this work. That will be one of the questions you will be called upon to determine. If you find from the preponderance of the evidence that the contract did extend to and include the work beyond, or on the east side of the Monroe Bridge, [74] you will take that work into consideration in assessing the amount of recovery. And if, on the other hand, you are not satisfied by the preponderance of the evidence that that work was included in plaintiff's contract you will exclude that part of the work from your consideration entirely in your deliberations.

[Proposed Amendment No. 16.]

Proposed Amendment No. 16: Insert immediately following the word “deliberations” appearing in fourth line on page 20 of the proposed Bill of Exceptions, these words, to wit: “Associated with the foregoing instructions and with other instructions given by the Court, the Court submitted to the jury four special findings bearing upon the question of the extent of work and limits of same as covered by the contract sued upon, and said special findings were submitted to the jury over the objection of the defendant, but with the positive consent and acquiescence of the plaintiff’s attorneys made prior to the giving of said instructions, and plaintiff’s attorneys then and there consented and acquiesced in submitting to the jury the questions involved in said foregoing instruction, and the said special findings, and the explanations of the court given to the jury with respect to same were and are as follows:

No. 1. Did the construction work covered by the plaintiff’s contract extend to Station No. 24, or did it end at the Monroe Street Bridge?

You will answer that question by inserting the words, ‘To station No. 24,’ or ‘To Monroe Street Bridge.’

The 2d interrogatory is as follows: If you find that the plaintiff’s contract extended to and included construction work east of the Monroe Street Bridge, and that such contract was breached by the defendant, how much, if any, damage do you assess for the breach of that part of the contract covering the work east of the Monroe Street Bridge?

Of course, gentlemen, if you find that the work did not extend beyond the Monroe Street Bridge you do not have to answer that interrogatory at all. But if you find that it did extend beyond the Monroe Street Bridge you will have to answer in it the damages which would result from the breach of that part of the contract.

The third interrogatory is: Did the plaintiff's contract extend to and include the two retaining walls between government Lots 3 and 4, and the retaining wall known as the Summit Boulevard retaining wall? [75]

You will answer that question 'Yes' or 'No.' If you answer it 'No' you will not be called upon to answer the 4th interrogatory that relates to the measure of damages for the breach of that part of the contract. If, however, you find that the contract did extend to and include those retaining walls you will have to answer the 4th interrogatory, which reads as follows:

If you find that the plaintiff's contract extended to and included these three retaining walls, and such contract was breached by the defendant, how much, if any, damage do you assess or allow for the breach of the contract relating exclusively to those three retaining walls?

Mr. SPENCER.—I would ask Your Honor to instruct the jury that in the event they find that the plaintiff exacted the requirement for the furnishing sand and gravel without cost to the plaintiff, or that he exacted the condition of financing, as instructed by Your Honor, then in either of such contingencies

they are not required to find upon the special findings which Your Honor has submitted.

The COURT.—Oh, yes; if their verdict goes for the defendant the special interrogatories are eliminated from the case.”

After concluding the charge to the jury, the Court, in the presence of the jury and before the jury retired, inquired of counsel for both parties as follows:

The COURT.—Anything further, gentlemen?

To which Mr. Plummer, of counsel for the plaintiff, then and there answered:

Mr. PLUMMER.—I don't think of anything, Your Honor.

Whereupon counsel for the defendant then and there in the presence of the jury and before the jury retired, reserved and took exceptions to certain instructions given by the Court, and to the refusal of the Court to submit to the jury certain instructions requested by defendant. But no exceptions to the charge of the Court were taken by plaintiff before the jury retired or at any other time, excepting those taken after the return of the verdict, pursuant to the stipulation hereinafter set forth.

The jury retired to deliberate upon its verdict in this cause on the 22d day of April, 1915, and returned its verdict into court in favor of the defendant on the 23d day of April, 1915, and said verdict was then and there received by the Court, and thereafter and on the 1st day of May, 1915, the parties entered into and [76] filed with the clerk of the court in this cause the following stipulation:

“It is hereby stipulated and agreed by the parties hereto, by their respective counsel, that plaintiff may have thirty days in which to take and file exceptions to the Court’s instructions, and for the preparation and service of a bill of exceptions in the above-entitled case.”

And thereafter, pursuant to said stipulation, on the 20th day of May, 1915, the plaintiff, by his attorney, took exceptions to, and filed with the clerk of this court exceptions to the instructions of the Court, which exceptions were and are as follows:

Exceptions to Instructions to the Jury.

“In the District Court of the United States for the Eastern District of Washington, Northern Division.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Comes now the above-named plaintiff, and under and by virtue of the stipulation heretofore signed by the parties hereto, and under the law, herewith files, states and presents his exceptions to the instructions given by the Court to the jury in the above-entitled cause.

I.

Plaintiff excepts to that part of instruction #2 which reads as follows: ‘I mention this for the reason that a contract between the defendant and

Caughren, Boynton & Company has been received in evidence to assist in determining the subject matter and limits of the work contemplated in the Alverson-Koeper Contract, exhibit "A"; that said Caughren, Boynton & Company contract with the railroad company received for no other purpose, and its terms and provisions are not to be considered by you except as instructed by the Court.'

II.

Plaintiff excepts to so much of instruction #2, as given by the Court, which read as follows: 'I charge you in this connection that the contract exhibit "A," under which plaintiff claims in this cause, does not require the railroad company to furnish sand without cost to plaintiff, and if you find from the evidence that the plaintiff imposed that condition upon the defendant, then the plaintiff in effect breached and abandoned the contract, and under such circumstances you should find for the defendant.'

III.

Plaintiff excepts to the following instructions, given as part of instruction #2, which was as follows: 'If you find that the plaintiff imposed and demanded, as a condition for the performance [77] of the work, that the defendant furnish gravel without cost to the plaintiff upon the work to be done under the contract exhibit "A," then you should find for the defendant.

IV.

Plaintiff excepts to the following instructions, given as part of instruction #2, which reads as follows: 'If you find that the plaintiff required and de-

manded as a condition for the prosecution and performance of the contract that the Railroad Company finance the plaintiff, then I charge you, in making such demand and imposing such condition, if you find the same was made by the plaintiff, then contract became thereby abandoned and breached by the plaintiff, and defendant was excused from the performance of the said contract by it, and your verdict should be for the defendant.'

V.

Plaintiff excepts to that part of instruction #3 given by the Court, which reads as follows: 'The contract is somewhat indefinite as to its eastern limits. One party contends that the contract extends only to the Monroe Street Bridge crossing the Spokane River. The other side contends that it extends to station No. 24, at or in the vicinity of Post Street, east of the Spokane River. In other words, Gentlemen of the Jury, the plaintiff contends that his contract covered the piers and other construction work north of the Spokane River, and east of the Monroe Street Bridge. The defendant contends that it did not cover or include this work. That will be one of the questions you are called upon to determine. If you find from the preponderance of the testimony that the contract did extend to and include the work beyond, or on the east side of the Monroe Street Bridge, you will take that work into consideration in assessing the amount of recovery. And if, on the other hand, you are not satisfied by the preponderance of the testimony that that work was included in plaintiff's contract you will exclude that part of the work from your con-

sideration entirely in your deliberations.'

VI.

Plaintiff excepts to that part of the last instruction given by the Court, which reads as follows: 'Mr. SPENCER.—I would ask your Honor to instruct the jury that in the event they find that the plaintiff exacted the requirements for the furnishing of sand and gravel without cost to the plaintiff, or that he exacted the condition of financing, as instructed by your Honor, then in either of said contingencies, they are not required to find upon the special findings which your Honor has submitted. The COURT.—Oh, yes.' "

Thereafter and after the return of the verdict the plaintiff moved for an order granting a new trial, which motion was argued by counsel and considered by the Court, and thereafter an order was made and entered by the Court denying a new trial, whereupon a final judgment was entered upon the verdict, in favor of the defendant and against the plaintiff, dismissing the cause and awarding costs to the defendant. [78]

Defendant moved to strike plaintiff's proposed bill of exceptions, which motion was overruled by the Court in view of the law and facts of the case and the stipulation of the parties hereinbefore set out, and all of plaintiff's exceptions are allowed by the Court.

[Certificate to Bill of Exceptions.]

United States of America,
Eastern District of Washington,—ss.

I, Frank H. Rudkin, Judge of the United States

District Court for the Eastern District of Washington, Northern Division, and the Judge before whom the above-entitled cause was tried, to wit, J. L. Alverson, plaintiff, vs. Oregon-Washington Railroad & Navigation Company, a corporation, defendant, which is number 2023 in said court, do hereby certify that within the time provided by law, the order of this Court and the stipulation of the parties, said plaintiff served upon the defendant and lodged and exhibited herein his proposed bill of exceptions, and thereafter and within the time provided by law and the order of this Court, the defendant filed, lodged and exhibited herein its proposed amendments to said proposed bill of exceptions.

Now, therefore, this cause having come regularly on at this time for hearing before the Court, on plaintiff's application for the settling and certifying of his said proposed bill of exceptions, and having heard and considered same and being fully advised in the premises, I do hereby further certify that the matters and proceedings embraced in the foregoing bill of exceptions, are matters and proceedings occurring in said cause and that said bill of exceptions contains all the material facts, matters and proceedings heretofore occurring in said cause not already a part of the record therein, and said bill of exceptions is hereby approved, [79] allowed and settled, as and for the true, full and correct bill of exceptions in said cause, and contains, in connection with the exhibits referred to therein, which will be sent up by special order of the Court hereafter to be made, all the evidence and proceedings had and

taken at the trial thereof and subsequent thereto, concerning the points of law and fact touched upon or referred to therein, and the same as so settled and allowed is here and now certified accordingly by me, and it is further ordered that this bill of exceptions so certified, be filed herein by the clerk.

The foregoing bill of exceptions, full, true and correct in all respects, is hereby approved, allowed and settled and made a part of the record herein.

Done in open court this 19th day of November, 1915.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Bill of Exceptions. Filed in the U. S. District Court for the Eastern District of Washington. November 19, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [80]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2023.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Assignment of Errors.

And now comes J. L. Alverson, plaintiff in the above entitled cause, and makes and files this his as-

signment of errors, upon which he will rely in the prosecution of the writ of error in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit.

I.

The Court erred in giving the following quoted portion of instruction number two, wherein the jury was instructed **that should it find from the evidence that the plaintiff demanded that the defendant furnish sand without cost to plaintiff, that then the plaintiff in effect breached and abandoned his contract and that the verdict should be for the defendant**; said instruction reading as follows:

“I charge you in this connection that the contract exhibit ‘A’ under which plaintiff claims in this case, does not require the railroad company to furnish sand without cost to plaintiff, and if you find from the evidence, that the plaintiff imposed that condition upon the defendant, then the plaintiff in effect breached and abandoned the contract, and under such circumstances you should find for the defendant.”

II.

The Court erred in giving the following quoted portion of instruction number two, wherein the jury was instructed **that should it find from the evidence that the plaintiff imposed and demanded as a condition for the performance of the work, that the defendant furnish gravel without cost to plaintiff, then the verdict should** [81] **be for the defendant**; said instruction reading as follows:

“If you find that the plaintiff imposed and de-

manded, as a condition for the performance of the work, that the defendant furnish gravel without cost to the plaintiff upon the work to be done under the contract exhibit 'A,' then you should find for the defendant."

III.

The Court erred in giving the following quoted portion of instruction number two, wherein the jury was instructed that should it find from the evidence that plaintiff required and demanded, as a condition for the prosecution and performance of its contract, that the railroad company finance the plaintiff, the plaintiff, by making such demand and imposing such condition, abandoned and breached his contract and that thereby excusing defendant from the performance of its contract, then the verdict should be for the defendant; said instruction reading as follows:

"If you find that the plaintiff required and demanded as a condition for the prosecution and performance of the contract that the railroad company finance the plaintiff, then I charge you, in making such demand and imposing such condition, if you find the same was made by the plaintiff, then contract became thereby abandoned and breached by the plaintiff, and defendant was excused from the performance of the said contract by it, and your verdict should be for the defendant."

IV.

The Court erred in assenting to and thereby in effect giving to the jury the following instruction requested by counsel for the defendant, to wit:

“I would ask your Honor to instruct the jury that in the event they find that the plaintiff exacted the requirements for the furnishings of sand and gravel without cost to the plaintiff, or that he exacted the condition of financing, as instructed by your Honor, then in either of said contingencies, they are not required to find upon the special findings which your Honor has submitted.”

V.

The Court erred in allowing the verdict rendered by the jury to stand.

VI.

The Court erred in denying plaintiff's motion for a new trial. [82]

VII.

The Court erred in entering final judgment on the verdict in favor of the defendant and against the plaintiff, and awarding costs to the defendant.

In order that the foregoing assignments may be and appear of record, the plaintiff presents the same to the Court and prays that the Court may consider in connection therewith the evidence adduced herein, and that said judgment of the lower court be reversed.

(Signed) PLUMMER & LAVIN and
O. C. MOORE,

Attorneys for Plaintiff.

[Endorsements]: Assignment of Errors. Filed in the U. S. District Court for the Eastern District of Washington, November 19th, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [83]

*In the District Court of the United States for the
Eastern District of Washington, Northern Divi-
sion.*

No. 2023.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Petition for Writ of Error.

Comes now the above-named plaintiff by his attorneys and complains that in the record and proceedings had in said cause, in the instructions of the Court to the jury, in the order of the Court denying plaintiff's motion for a new trial and in the rendition and entry of the final judgment made and entered herein, on the 21st day of June, 1915, in favor of the defendant and against plaintiff, dismissing said cause and awarding costs to defendant, manifest error hath happened to the great damage of this plaintiff;

Your petitioner further respectfully shows that he has this day filed herewith his assignments of error committed by the Court below in said cause and intended to be urged by your petitioner, plaintiff in error herein, in prosecution of this, his suit in error.

WHEREFORE, said plaintiff prays for the allowance of a writ of error to the said Circuit Court of Appeals and for an order fixing the amount of bond, and for such other orders and process as may

be necessary to cause the same to be corrected by the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

(Signed) PLUMMER & LAVIN and
O. C. MOORE,

Attorneys for Plaintiff.

[Endorsements]: Petition for Writ of Error. Filed in the U. S. District Court for the Eastern District of Washington, November 19, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [84]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2023.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Order Allowing Writ of Error.

J. L. Alverson, having filed his petition for a writ of error from the judgment of the Court entered herein on the verdict of the jury on the 21st day of June, 1915, in favor of defendant and against the plaintiff, dismissing said cause and awarding costs to defendant, also prays that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, for this plaintiff, to the United States Circuit Court of Appeals

for the Ninth Judicial Circuit, having likewise filed and exhibited an Assignment of Errors on which he relies for a reversal;

Now, therefore, it is ORDERED, that a writ of error be and hereby is allowed in order that a review may be had in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, of the final judgment heretofore entered herein on the 21st day of June, 1915, and on all proceedings in said cause, and it is further ordered that said plaintiff furnish bond conditioned as required by law to the satisfaction of the court, in the sum of one hundred dollars.

Dated this 19th day of November, 1915.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Allowing Writ of Error. Filed in the U. S. District Court for the Eastern District of Washington, November 19, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [85]

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 2023.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Writ of Error [Copy].

United States of America,
Eastern District of Washington,
Northern Division,—ss.

The President of the United States, to the Honorable, the Judge of the District Court of the United States for the Eastern District of Washington, Northern Division:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between J. L. Alverson, plaintiff in error, and the Oregon-Washington Railroad & Navigation Company, a corporation defendant in error, a manifest error hath happened, to the great damage of said J. L. Alverson, as by his complaint appears;

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 19th day of December, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and

according [86] to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 19th day of November, in the year of our Lord one thousand nine hundred and fifteen.

[Seal] (Signed) W. H. HARE,
Clerk of the United States District Court for the Eastern District of Washington, Northern Division.

Allowed by:

(Signed) FRANK H. RUDKIN,
District Judge.

[Endorsements]: Writ of Error. Filed in the U. S. District Court for the Eastern District of Washington, November 19, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [87]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 2023.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, J. L. Alverson as principal, and Stella

Lombard as surety, are held and firmly bound unto the Oregon-Washington Railroad & Navigation Company, a corporation, in the sum of one hundred dollars (\$100), for the payment of which well and truly to be made, we bind ourselves and each of us and our and each of our heirs, executors and administrators, jointly, severally and firmly by these presents.

Signed, sealed and dated this 19th day of November, A. D. 1915.

The conditions of the above obligation are such that whereas on the 21st day of June, A. D. 1915, an order and judgment was made and entered by the Court in the above-entitled cause in favor of the defendant and against the plaintiff, allowing said defendant its costs in said action, and the said plaintiff has obtained from said Court a writ of error to reverse said judgment in the aforesaid action and a citation directed to the said above-named defendant, citing and admonishing it to appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco in the State of California, and for that purpose he has been required by order of Court to give and furnish security in the sum of one hundred dollars (\$1.00);

Now, therefore, if the said J. L. Alverson shall prosecute his said writ of error to effect and answer all costs, if he shall [88] fail to make his plea good, then this obligation shall be null and void;

otherwise to remain in full force and effect.

(Signed) J. L. ALVERSON,
Principal.
STELLA LOMBARD,
Surety.

State of Washington,
County of Spokane,—ss.

Stella Lombard, being first duly sworn, on oath deposes and says: That she is a resident of the State of Washington and is worth the sum of one hundred dollars (\$100) over and above all debts and liabilities, in property within the State of Washington, exclusive of property exempt from execution.

(Signed) STELLA LOMBARD,

Subscribed and sworn to before me this 19th day of November, A. D. 1915.

[Seal] (Signed) JOSEPH J. LAVIN,
Notary Public in and for the State of Washington,
Residing at Spokane.

Approved November 19, 1915.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Bond on Writ of Error. Filed in the U. S. District Court for the Eastern District of Washington, November 19, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [89]

*In the District Court of the United States, for the
Eastern District of Washington, Northern Di-
vision.*

No. 2023.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Citation [Copy].

United States of America,
Eastern District of Washington,—ss.

The President of the United States, to the Oregon-
Washington Railroad & Navigation Company,
a Corporation, and to A. C. Spencer and Ham-
blen & Gilbert, your Attorneys, Greeting:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Ap-
peals, for the Ninth Circuit, to be held at the city of
San Francisco, in the State of California, within
thirty (30) days from the date of this citation, pur-
suant to a writ of error filed in the clerk's office of
the District Court of the United States for the East-
ern District of Washington, Northern Division,
wherein J. L. Alverson is plaintiff in error and you
are the defendant in error, to show cause, if any
there be, why the judgment and other proceedings
had in said cause in said writ of error mentioned
should not be corrected and speedy justice should not
be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 19th day of November, 1915, and of the Independence, of the United States the one hundred and fortieth.

[Seal] (Signed) FRANK H. RUDKIN,
United States District Judge.

Attest: (Signed)

W. H. HARE,
Clerk. [90]

[Endorsements]: Citation. Service of the Within Citation and Receipt of a Copy Thereof Admitted this 19th day of November, A. D. 1915. (Signed) A. C. Spencer and Hamblen & Gilbert, Attorneys for Defendant. Filed in the U. S. District Court for the Eastern District of Washington, November 19, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [91]

*In the District Court of the United States, for the
Eastern District of Washington, Northern Di-
vision.*

No. 2023.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Praecipe [for Transcript of Record].

To W. H. Hare, Clerk of said Court:

You are hereby requested to prepare and certify,

as provided by law, a transcript of the record in the above-entitled case to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit under the Writ of Error heretofore issued in said cause, and you will please include in said transcript the following proceedings, pleadings, papers, records and files, to wit:

Complaint;

Amended Answer;

Reply to Amended Answer;

Verdict of Jury;

Motion for New Trial;

Stipulation Extending Time for Filing Exceptions
to Instructions;

Judgment for Defendant on Verdict;

Order Extending Time for Filing Proposed Bill of
Exceptions;

Order Removing Cause from State to Federal
Court;

Order Dismissing Certain Parties Defendant;

Order Extending Time for Filing Amendments to
Proposed Bill of Exceptions;

Bill of Exceptions;

Assignment of Errors;

Petition for Writ of Error;

Order Allowing Writ of Error;

Writ of Error;

Bond on Writ of Error;

Citation;

Praecipe;

Order Denying New Trial;

—together with any and all other records entries,

pleadings, proceedings, papers and files necessary or proper to make a complete record [92] upon said Writ of Error under the Assignment of Errors filed herein, said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

(Signed) PLUMMER & LAVIN and

O. C. MOORE,

Attorneys for Plaintiff.

[Endorsements]: Praecipe for Transcript of Record. Filed in the U. S. District Court for the Eastern District of Washington, November 19, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy.
[93]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.*

No. 2023.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

United States of America,

Eastern District of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the

United States in and for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages constitute and are a full, true, correct and complete copy of so much of the record, pleadings, orders and other proceedings had in said action, as the same remain of record and on file in the office of the clerk of the said District Court, as called for by the plaintiff and plaintiff in error in his praecipe; and that the same constitute the record on writ of error from the judgment of the District Court of the United States in and for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California, which writ of error was lodged and filed in my office on November 19th, 1915.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation issued in this cause.

I further certify that the fees of the clerk of this court for preparing and certifying to the foregoing typewritten record amount to the sum of thirty-six dollars and twenty cents (\$36.20), and that the same has been paid in full by Plummer & [94] Lavin, attorneys for the plaintiff and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Spokane, in said District, this 2d day of December, 1915.

[Seal]

W. H. HARE,
Clerk. [95]

[Endorsed]: No. 2703. United States Circuit Court of Appeals for the Ninth Circuit. J. L. Alverson, Plaintiff in Error, vs. Oregon-Washington Railroad & Navigation Company, a Corporation, Defendant in Error. Transcript of Record Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Received December 6, 1915.

F. D. MONCKTON,
Clerk.

Filed December 10, 1915.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk. [96]

*In the District Court of the United States, for the
Eastern District of Washington, Northern Division.*

No. 2023.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Writ of Error [Original].

United States of America,
Eastern District of Washington,
Northern Division,—ss.

The President of the United States, to the Honorable, the Judge of the District Court of the United States, for the Eastern District of Washington, Northern Division:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between J. L. Alverson, plaintiff in error, and the Oregon-Washington Railroad & Navigation Company, a corporation, defendant in error, a manifest error hath happened, to the great damage of said J. L. Alverson, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 19th day of December next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, [97] the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of

right, and according to the laws and customs of the United States should be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 19 day of November, in the year of our Lord one thousand nine hundred and fifteen.

W. H. HARE,
Clerk of the United States District Court for the Eastern District of Washington, Northern Division.

Allowed by:

[Seal] FRANK H. RUDKIN,
District Judge.

[Endorsed]: No. 2023. J. L. Alverson, Plaintiff, v. Oregon-Washington Railroad & Navigation Company, a Corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Eastern District of Washington. Nov. 19, 1915. Wm. H. Hare, Clerk. S. M. Russell, Deputy.

No. 2703. United States Circuit Court of Appeals, for the Ninth Circuit. Original Writ of Error. Filed Dec. 10, 1915. F. D. Monckton, Clerk.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 2023.

J. L. ALVERSON,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Citation [on Writ of Error (Original)].

United States of America,
Eastern District of Washington,—ss.

The President of the United States to the Oregon-
Washington Railroad & Navigation Company,
a Corporation and to A. C. Spencer and Ham-
blen & Gilbert, your Attorneys, Greeting:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Ap-
peals, for the Ninth Circuit, to be held at the city of
San Francisco, in the State of California, within
thirty (30) days from the date of this citation, pur-
suant to a writ of error filed in the clerk's office of
the District Court of the United States for the East-
ern District of Washington, Northern Division,
wherein J. L. Alverson is plaintiff in error and you
are the defendant in error, to show cause, if any
there be, why the judgment and other proceedings
had in said cause in said writ of error mentioned
should not be corrected and speedy justice should not
be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 19th day of November, 1915, and of the Independence of the United States the one hundred and fortieth.

[Seal]

FRANK H. RUDKIN,
United States District Judge.

Attest:

W. H. HARE,
Clerk. [98]

[Endorsed]: No. 2023. J. L. Alverson, Plaintiff, vs. Oregon-Washington Railroad & Navigation Company, a Corporation, Defendant. Citation. Filed in the U. S. District Court, Eastern District of Washington. Nov. 19, 1915. Wm. H. Hare, Clerk. S. M. Russell, Deputy.

Service of the within Citation and receipt of a copy thereof admitted this 19th day of November, A. D. 1915.

A. C. SPENCER,
HAMBLIN & GILBERT,
Attorneys for Defendant.

No. 2703. United States Circuit Court of Appeals, for the Ninth Circuit. Original Citation on Writ of Error. Filed Dec. 10, 1915. F. D. Monckton, Clerk.

9

No. 2703

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

J. L. ALVERSON,
Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAV-
IGATION COMPANY, a Corporation,
Defendant in Error.

OPENING BRIEF FOR PLAINTIFF
IN ERROR.

*Upon Writ of Error to the District Court of the
United States, Eastern District of Wash-
ington, Northern Division.*

PLUMMER & LAVIN,
Attorneys for Plaintiff in Error,
509 Mohawk Block,
Spokane, Washington.

O. C. MOORE,
Attorney for Plaintiff in Error,
501 Peyton Building,
Spokane, Washington.

COLE PRINTING COMPANY

Filed

JAN 25 1916

No.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

J. L. ALVERSON,
Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAV-
IGATION COMPANY, a Corporation,
Defendant in Error.

OPENING BRIEF FOR PLAINTIFF
IN ERROR.

*Upon Writ of Error to the District Court of the
United States, Eastern District of Wash-
ington, Northern Division.*

PLUMMER & LAVIN,
Attorneys for Plaintiff in Error,
509 Mohawk Block,
Spokane, Washington.

O. C. MOORE,
Attorney for Plaintiff in Error,
501 Peyton Building,
Spokane, Washington.

No.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

J. L. ALVERSON,
Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAV-
IGATION COMPANY, a Corporation,
Defendant in Error.

OPENING BRIEF FOR PLAINTIFF
IN ERROR.

*Upon Writ of Error to the District Court of the
United States, Eastern District of Wash-
ington, Northern Division.*

STATEMENT.

This action was instituted by plaintiff in error, Alverson, for the recovery of damages, in the form of lost profits, resulting from a breach by defendant in error, Oregon-Washington Railroad & Navigation Company, hereafter referred to as the railroad, of a contract for the performance by Alver-

son of certain railroad construction work. Other parties originally named as defendants were subsequently dismissed, leaving the railroad as the sole defendant.

We shall state such portions only of the issues and facts as seem to us pertinent and material to an intelligent understanding of the questions presented by the assignments of error.

Alverson and one L. L. Koeper, as co-partners under the name of Alverson and Koeper, had a subcontract, dated May 11, 1911, for the performance of the work in question (Exhibit "A" attached to the Complaint, Record 7). Thereafter Alverson succeeded to all the rights of the partnership of Alverson & Koeper, and the right of Alverson, as successor of the aforesaid co-partnership, to proceed with the work as an individual was specifically recognized and affirmed in writing by Caughren, Boynton & Company on February 1st, 1912 (Record 28, 67; Plaintiff's Exhibit "D", attached to the Complaint). Subsequently, in the adjustment of certain differences which had arisen between the railroad and the principal contractors, Caughren, Boynton & Company, it was agreed that unless the railroad should, within thirty days from the date of said agreement, April 1, 1912, elect to have the

work completed by them, said principal contractors should be relieved of their obligation for the performance of said work and the railroad would thereupon assume all the obligations of said principal contractors to parties holding sub-contracts for the performance of said work (Plaintiff's Exhibit "E", attached to the Complaint; Record 29). It is admitted by the amended answer that the railroad did not so elect.

The testimony shows, without dispute, that Alverson frequently expressed to the chief engineer of the railroad his willingness to go ahead under his contract, and that he was just as frequently told by that official that the plans for the work were not completed but that he would be informed in due time and allowed to proceed with the work when the railroad should become ready. (Testimony of Alverson, Record 70, 72; testimony of J. Z. Moore, Record 84.) The testimony is also undisputed that Alverson was financially able to perform his contract, and he further testified that he was willing and anxious to do so (Record 72). Many months later, and without ever having requested Alverson to perform said work or notified him of its readiness to have same done, said work was let by the railroad to other contractors by whom it was completed.

The testimony also shows, that in the course of conversations between Alverson and the chief engineer of the railroad in the winter and spring of 1913, a difference of opinion arose as to the proper construction of Alverson's contract and the arbitration agreement between the railroad and Coughren, Boynton & Company. Alverson contending that under said contract he was entitled to be financed and furnished with sand and gravel by the railroad without charge, while the engineer of the railroad appears to have contended for an opposite construction. (Cross-examination of Alverson, Record 74, *et sec.*) The record shows that these were mere discussions and expressions of opinion, and it is not disputed that the railroad never offered to allow Alverson to do the work under his contract, but, on the other hand, continually put him off when he requested to be permitted to go ahead, until the work was finally let to and completed by other contractors.

Paragraph four of Alverson's contract (Record 9), provides:

“It is further understood and agreed that if the Contractor, in the opinion of the Engineer (communicated in writing by the Engineer to the Contractor) shall fail or refuse to comply with any of the stipulations contained in this contract to be performed by the Con-

tractor, or shall at any time neglect or refuse to prosecute the work with a sufficient force, to insure the completion of the work within the time specified herein, then the Railroad Company may, at its option, after the expiration of 10 days from the mailing of such notice to the Contractor at his Post Office address, cancel this contract and declare the same void, and a notice in writing mailed to the Contractor at his Post Office address, signed by the Railroad Company, shall be sufficient for that purpose. In the event the contract is cancelled as herein provided, the Contractor shall have no claim whatever against the Railroad Company for damages, and all compensation or percentage unpaid to the Contractor under the provisions of this contract shall be retained by the Railroad Company, together with any material then on the ground belonging to the Contractor, to indemnify it from any loss by reason of the default of the Contractor, and the Railroad Company may, at its option, employ other parties to complete said work or any part thereof, and any loss occasioned by reason of such default to be chargeable against the Contractor, the amount of such loss to be estimated by the Engineer, whose decision shall be final and binding on the parties hereto."

There was no pretense of a compliance by the railroad with the provisions of the contract above quoted, but the work was let to other contractors and had progressed far toward completion before Alverson was even aware that he was not to be allowed to perform the work.

The following instructions given orally by the

trial court to the jury, and excepted to by Alverson, are specified in the assignment of errors herein as grounds for reversal, to-wit:

“I charge you in this connection that the contract, Exhibit A, under which plaintiff claims in this case, does not require the railroad company to furnish sand without cost to plaintiff, and if you find from the evidence, that the plaintiff imposed that condition upon the defendant, then the plaintiff in effect breached and abandoned the contract, and under such circumstances you should find for the defendant.”

“If you find that the plaintiff imposed and demanded, as a condition for the performance of the work, that the defendant furnish gravel without cost to the plaintiff upon the work to be done under the contract, Exhibit A, then you should find for the defendant.”

“If you find that the plaintiff required and demanded, as a condition for the prosecution and performance of the contract, that the railroad company finance the plaintiff, then I charge you, in making such demand and imposing such condition, if you find the same was made by the plaintiff, the contract became thereby abandoned and breached by the plaintiff, and defendant was excused from the performance of the said contract by it, and your verdict should be for the defendant.”

The jury returned a verdict in favor of defendant.

A motion for a new trial was thereafter interposed (Record 58), urging the giving of these in-

structions as grounds for the setting aside of the verdict of the jury, which motion was subsequently denied by the court (Record 62). Judgment in favor of the railroad was subsequently entered on the verdict, for the review of which this writ is prosecuted.

ASSIGNMENTS OF ERROR.

The plaintiff has specified the following errors which he believes to have been committed by the lower court in the course of the trial and in the proceedings leading up to and including the entry of the final judgment:

1. The court erred in giving the following quoted portion of instruction number two, wherein the jury was instructed that should it find from the evidence that the plaintiff demanded that the defendant furnish sand without cost to plaintiff, that then the plaintiff in effect breached and abandoned his contract and that the verdict should be for the defendant; said instruction reading as follows:

“I charge you in this connection that the contract, Exhibit A, under which plaintiff claims in this case, does not require the railroad company to furnish sand without cost to plaintiff, and if you find from the evidence, that the plaintiff imposed that condition upon

the defendant, then the plaintiff in effect breached and abandoned the contract, and under such circumstances you should find for the defendant.”

2. The court erred in giving the following quoted portion of instruction number two, wherein the jury was instructed that should it find from the evidence that the plaintiff imposed and demanded as a condition for the performance of the work, that the defendant furnish gravel without cost to plaintiff, then the verdict should be for the defendant; said instruction reading as follows:

“If you find that the plaintiff imposed and demanded, as a condition for the performance of the work, that the defendant furnish gravel without cost to the plaintiff upon the work to be done under the contract, Exhibit A, then you should find for the defendant.”

3. The court erred in giving the following quoted portion of instruction number two, wherein the jury was instructed that should it find from the evidence that plaintiff required and demanded, as a condition for the prosecution and performance of its contract, that the railroad company finance the plaintiff, the plaintiff, by making such demand and imposing such condition, abandoned and breached his contract and that thereby excusing defendant from the performance of its contract,

then the verdict should be for the defendant; said instruction reading as follows:

“If you find that the plaintiff required and demanded as a condition for the prosecution and performance of the contract that the railroad company finance the plaintiff, then I charge you, in making such demand and imposing such condition, if you find the same was made by the plaintiff, the contract became thereby abandoned and breached by the plaintiff, and defendant was excused from the performance of the said contract by it, and your verdict should be for the defendant.”

4. The court erred in assenting to and thereby in effect giving to the jury the following instruction requested by counsel for the defendant, to-wit:

“I would ask Your Honor to instruct the jury that in the event they find that the plaintiff exacted the requirement for the furnishings of sand and gravel without cost to the plaintiff, or that he exacted the condition of financing, as instructed by Your Honor, then in either of said contingencies, they are not required to find upon the special findings which Your Honor has submitted.”

5. The court erred in allowing the verdict rendered by the jury to stand.

6. The court erred in denying plaintiff's motion for a new trial.

7. The court erred in entering final judgment on the verdict in favor of defendant and against the plaintiff, and awarding costs to the defendant.

ARGUMENT.

From the above instructions it will be observed that the trial court was of the opinion that the demand by one party to an executory contract, before the time had arrived for and before he had been given an opportunity to perform, for more than he was in fact entitled to under the contract, would of itself constitute a repudiation. This view is not supported either by reason or authority and the courts of this country, wherever the question has been presented, have held that such a demand, where the party has not incapacitated himself from performing, does not constitute a breach nor authorize the other party in treating the contract as ended. In order to constitute a repudiation there must be a positive and absolute disavowal of the contract and an expressed determination not to be bound by its provisions.

The courts, on the other hand, have universally held that mere talk by one of the parties before the arrival of the time for performance, though it amount to a demand for more than the contract allows, does not amount to a breach, and this is the utmost that can be charged against Alverson in the case at bar.

Page on Contracts, Sec. 1439, P. 2237, states:

“If one party to the contract claims as contract rights thereunder more than he is given by the contract, such claim does not of itself amount to a renunciation of the contract. Thus the principal’s claiming that the agent under a contract for buying cotton should furnish the principal with an invoice and further description of the cotton, as well as the samples stipulated for in the contract, is not renunciation. Thus if one party claims by virtue of the contract a right to forfeit it under existing conditions, his ineffectual attempt to declare such forfeiture is not a renunciation. If he does not refuse performance at the proper time the adversary party cannot treat the contract as avoided.”

In 6 Ruling Case Law, 930, the general rule is stated as follows:

“It is the party’s conduct evincing an intent to be no longer bound by the contract that is equivalent to consent to a rescission. Refusal to fulfil a contract must be absolute to be a tantamount to an assent to its dissolution, and to authorize the other party to rescind it; such refusal must be in no way qualified, and should substantially amount to an avowed determination of the party not to abide by the contract.”

Mechem on Sales, Vol. 2, Sec. 1087, expresses the rule thus:

“Where before the time arrives for the performance of the contract by one party, the other absolutely and unqualifiedly announces

that he will neither receive such performance by the former nor perform on his part, the former may, if he desires, consider himself as absolved from his duty to perform. This renunciation by the other, however, must be more than mere idle talk of not performing; it must be a distinct, unequivocal and absolute refusal to receive performance or to perform on his own part."

In Lawson on Contracts, Sec. 440, P. 479, discussing the question of what is sufficient to constitute an anticipatory breach before the arrival of the time for performance, it is said:

"A mere expression of intention not to perform is not a breach; it requires a distinct and unequivocal absolute refusal to perform the promise, which must be treated and acted upon as such by the party to whom the promise was made."

We wish here to emphasize and ask the court to bear constantly in mind that Alverson did not even express an intention not to perform his undertaking, but on the other hand, constantly sought an opportunity to do so, and the utmost that can be said is that in advance of an opportunity for performance, he expressed an opinion in conversation with the railroad engineer and superintendent of construction concerning his rights and obligations under said contract at variance with the views of that official.

The rule here contended for has received the emphatic approval of the United States Supreme Court. The question was presented and squarely decided in the case of *Colby vs. Reed*, 99 U. S., 560, where it is said:

“Neither the answer nor the evidence shows that the defendant ever did perform the agreement to deliver, but what he alleged and attempted to prove was that the plaintiff claimed \$13,000 of stock more than he, the defendant, contracted to deliver; and his theory is that the demand being in excess of the obligation created by the contract, was null and of no effect, and inasmuch as the demand exceeded the right, he was not required to perform what the contract required.”

* * * * *

“Responsive to the second request, the Judge told the jury that where a party demands more than he is entitled to receive, that circumstance alone will not justify the other party in refusing to deliver that part of the property to which the party making the demand is entitled, provided it is distinct, well known and clearly distinguishable from that to which the demanding party had no right; that if the plaintiff demanded \$45,000 of the stock when he was only entitled to \$32,000 of the same, the defendant could not properly refuse to deliver what the plaintiff was entitled to receive, on the ground that the demand was excessive. Injustice and inconvenience would flow from any different rule, and inasmuch as we are all of the opinion that the instruction was correct, it is not deemed necessary to pursue the subject.”

In the cases of *U. S. vs. Smoot*, 82 U. S. 36, and *Dingley vs. Oler*, 117 U. S. 490, the Supreme Court, going much further than is required by the circumstances of this case, held, in accordance with the general rule in this country, that a mere assertion of unwillingness or inability to perform a contract, before the time for performance has arrived, does not constitute a renunciation. In the latter case, affirming the doctrine announced in the former, the court said:

“In *Smoot’s* case, 15 Wall. 36, this court quoted with approval the qualifications stated by Benjamin on Sales, 424, that ‘a mere assertion that the party will be unable or will refuse to perform his contract is not sufficient. It must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for, if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end.’

We do not find any such refusal to have been given or acted upon in the present case, and the facts are not stronger than those in *Avery v. Bowden*, 5 El. & Bl. 714, and 6 El. & Bl. 953, which were held not to constitute a breach or renunciation of the contract. The most recent English case on the subject is that of *Johnstone v. Milling*, in the court of appeal, 16 Q. B. Div. 460, decided in January of the present year, which holds that the words or conduct relied on as a breach of the contract by anticipation must amount to a total refusal

to perform it, and that that does not, by itself, amount to a breach of the contract unless so acted upon and adopted by the other party.

The present action was prematurely brought before there had been a breach of the contract, even in this sense, by the defendants; for what they said on July 15th amounted merely to a refusal to comply with the particular demand then made for an immediate delivery."

It is obviously unnecessary in this controversy to go to the length to which the Supreme Court went in the Smoot and Dingley cases, since Alverson never at any time expressed a disposition to renounce his contract or refused to be bound by its terms, but simply, in advance of an opportunity for performance, expressed an opinion concerning his rights thereunder in conflict with that of the officials of the railroad. That opinion was, of course, subject to modification, and even though it be conceded to have been wrong, could not in any event have justified the railroad in ignoring the rights of Alverson by letting the work to other parties without offering him an opportunity to perform and without even giving him the notice required by the terms of the contract itself.

That neither an erroneous construction of the terms of a contract by one of the parties thereto nor a demand by such party for more than he is entitled to receive thereunder, constitutes grounds

for rescission by the other party, was distinctly held by the Supreme Court of West Virginia in *Armstrong vs. Ross*, 55 S. E. 895. Citing the U. S. Supreme Court cases above quoted, the court said:

“Lastly, a claim to the right of rescission is founded upon the refusal of the appellee to accept performance as offered by the appellant, the interpretation of the latter having been the correct one, and his offer an expression of willingness to perform to the extent of his duty in the premises. Since the refusal was not absolute, the rule invoked does not apply. To work a release, a refusal to perform must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made. *Swiger v. Hayman*, 56 W. Va. 123, 126, 48 S. E. 839, 107 Am. St. Rep. 889; *United States v. Smoot*, 15 Wall. (U. S.) 36, 21 L. Ed. 107; *Dingley v. Oler*, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984. If this were not the law, it would be a dangerous thing to stand upon a controverted construction of a contract. Every man would act at his peril in such cases, and be subjected to the alternative of acquiescing in the interpretation adopted by his opponent, or putting to hazard his entire interest in the contract. The courts have never imposed terms so harsh, or burdens of such weight. It would amount to a virtual denial of the right to insist upon an honest, but erroneous, interpretation.”

Though the precise question here presented can not be said to have been directly involved, the Supreme Court of North Dakota in the case of

Stanford vs. McGill, 72 N. W. 938, in holding that an expressed determination to repudiate a contract made in advance of the time for performance does not constitute a breach, took occasion to review both the American and English authorities bearing on the general principles involved in a most thorough and instructive manner. In the course of a lengthy opinion the court said:

“It is claimed that plaintiff rescinded the contract by selling the 5,000 bushels in Duluth on the 9th of September, two days after the defendants had written plaintiff that they would not fulfill their agreement. * * * Although the English courts have, in our judgment, departed from sound principles, in holding that mere talk is a breach of a contract, despite the fact that the time for performance thereof has not arrived, yet they have not violated justice as well as legal principles by putting it in the power of the party to an agreement, who does not wish to fulfill it, to force a breach upon the other party before the day for performance has arrived, and thus escape the perhaps more serious consequences which might flow from a breach at the time of performance, by selecting such a season for a premature breach thereof as would make the damages comparatively light. * * * We are confident in the soundness of our view that the English doctrine, that a refusal to perform a contract before the period of performance by either party has arrived constitutes a breach thereof, is violative of legal principles, and leads to most incongruous results.”

In the case of Emack vs. Hughes, 52 At. 1061, in a suit arising *ex contractu* the contention was advanced that the contract had been breached by plaintiff through the making of excessive demands, not justified by the terms of the contract in question. The court, in rejecting this contention, said:

“Even an excessive demand would not excuse from a proper performance. Colby v. Reed, 99 U. S. 560, 564, 25 L. Ed. 486. August 22d the defendant notified the plaintiff that the contract was at an end, because the plaintiff had not put up his notes on the 15th. The plaintiff’s answer was that the defendant was in no position to complain, having failed to ship slate to cover the notes already up. The court told the jury that it was not what the parties had demanded of each other in their letters that was to determine who broke the contract, but which one first failed to do what he was bound to do.”

In the case of Ga Nun vs. Palmer, 96 N. E. 99, 101, the New York court of appeals took occasion to say:

“Where the contract is wholly executory, there must be some express and absolute refusal to perform, or some voluntary act on the part of the individual which renders it impossible for him to perform, in order to constitute an anticipatory breach for which an action will lie; whereas, by a partially executed contract, the breach may result from a failure to perform some of the provisions of the contract.”

So in *Lundahl vs. Hansen*, 35 N. E. 741, the Supreme Court of Illinois announced the rule as follows:

“The mere fact that one of the parties may have understood his rights under the contract to be different from what they in fact were, and attempted to declare a forfeiture of it, when he had no legal right to do so, would not, as we understand the law, necessarily entitle the other party to treat the contract as rescinded. * * * The weakness of appellant’s case lies in the fact that he seeks to rescind and cancel a contract fairly entered into, because of an attempt by the other contracting party to do a thing which he had no right to do, but which was wholly harmless to him.”

So in the case of *Bell vs. Maximos*, 19 S. W. 1070, 1072, the Supreme Court of Texas, holding that a demand by one party to a contract for more than he was entitled to received thereunder, does not constitute a breach thereof nor justify the other party in considering the contract as ended, used the following language:

“At least a failure to classify until such information was furnished would not be a repudiation of the contract until the defendants should give notice that it would not be furnished, which was never done. * * * Of course, it was not the duty of the defendants to send the invoice of the cotton unless the contract bound them to do so; but the solution of that question in their favor, should we

do so, would not be decisive of the respective rights of the parties upon this appeal. They may not have been required, by the terms of the agreement, to forward invoices in addition to the 'tags and samples'; and yet the facts that the plaintiff requested the invoices, and delayed attempting to classify the cotton until they could be obtained, does not, as we think, in connection with the other circumstances of the case, show that he intended to repudiate, or had repudiated, the contract, but quite the contrary."

Many additional authorities might be cited to the same effect, but the foregoing are sufficient, we believe, to illustrate and convince the court of the correctness of our contention.

As heretofore pointed out, paragraph IV of Alverson's contract required the railroad company to give Alverson 10 days' notice in writing of any alleged default on his part as a condition precedent to the exercise by the railroad of its election to declare said contract void, because of a breach on the part of Alverson. The provision being as follows:

"It is further understood and agreed that if the Contractor, in the opinion of the Engineer (communicated in writing by the Engineer to the Contractor) shall fail or refuse to comply with any of the stipulations contained in this contract to be performed by the Contractor, or shall at any time neglect or refuse to prosecute the work with a sufficient

force, to insure the completion of the work within the time specified herein, then the Railroad Company, at its option, after the expiration of 10 days from the mailing of such notice to the Contractor at his Post Office address, cancel this contract and declare the same void, and a notice in writing mailed to the Contractor at his Post Office address, signed by the Railroad Company, shall be sufficient for that purpose. In the event the contract is cancelled as herein provided, the Contractor shall have no claim whatever against the Railroad Company for damages, and all compensation or percentage unpaid to the Contractor under the provisions of this contract shall be retained by the Railroad Company, together with any material then on the ground belonging to the Contractor, to indemnify it from any loss by reason of the default of the Contractor, and the Railroad Company may, at its option, employ other parties to complete said work or any part thereof, and any loss occasioned by reason of such default to be chargeable against the Contractor, the amount of such loss to be estimated by the Engineer, whose decision shall be final and binding on the parties hereto."

A full compliance by the railroad with the requirements of the above quoted provision of the contract was necessary as a condition precedent to a rescission by the railroad, even had Alverson given sufficient cause for a declaration of forfeiture. The railroad, however, did not give the required notice nor pretend to, in any sense, comply with the requirements imposed upon it by said un-

dertaking, and its failure in that regard shows that its officers fully understood that no sufficient grounds for forfeiture existed and that the letting of the work to other contractors was done with full knowledge and in deliberate and willful violation of the rights of Alverson.

The record shows that Alverson's motion for a new trial squarely presented to the trial court the incorrectness of the instructions to which objection is here made, and we respectfully contend that the lower court committed further and cumulative error in refusing a new trial and in entering judgment for defendant.

The judgment below should be reversed and a new trial granted.

Respectfully submitted,

PLUMMER & LAVIN *and*

O. C. MOORE,

Attorneys for Plaintiff in Error.

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In the United States Circuit Court of Appeals

For the Ninth Circuit

J. L. ALVERSON,

Plaintiff in Error,

vs.

OREGON - WASHINGTON RAIL-
ROAD & NAVIGATION COM-
PANY, a Corporation,

Defendant in Error

2703

BRIEF FOR DEFENDANT IN ERROR

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Clerk.

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BRIEF FOR DEFENDANT IN ERROR

STATEMENT

Shortly prior to January, 1912, the Oregon-Washington Railroad & Navigation Company entered into a contract with the partnership firm of Caughren, Boynton & Company involving the construction by the latter, among other things, of certain concrete structures required in the building of a railroad into the City of Spokane, Washington.

The partnership firm referred to sub-let that portion of their construction work involving the concrete

structures in question to the partnership firm of Alverson and Koeper.

The constructon contract so entered into between these two firms of contractors is attached to the complaint in this action and it will be observed that a railroad form was used wherein the principal contractors designated themselves as "Railroad Company," and the sub-contractors designated themselves as "Contractor." (See Page 7 et seq., Record).

The Caughren firm proceeded with the work reserved to themselves in their contract with the Railroad Company and during the progress of the same controversies arose between the parties to the contract which were submitted to arbitration pursuant to an arbitration agreement entered into April 25, 1912, between the Railroad Company and the Caughren firm (Page 29 Record). This arbitration agreement provided (Page 33 Record), "In the event that the Railroad Company does not elect within thirty (30) days from date hereof to have the contractor complete the structures, the construction of which has not at this date been commenced, then and in that event the Railroad Company shall assume all obligations of the contractor to the party or parties holding sub-contracts for the construction thereof."

The plaintiff in error, Alverson, had dissolved with his partner, Koeper, prior to the execution of this arbitration agreement and for the purpose of this record was a sub-contractor within the terms of the provision of the arbitration agreement quoted.

The Railroad Company not having elected to have the contractor (The Caughren firm) complete the structures yet to be constructed, was for the purpose of this record bound to recognize Alverson with respect to his sub-contract.

The obligation of the Railroad Company to Alverson was measured by the sub-contract Exhibit "A" above referred to. It is so contended by him in his complaint and was so recognized by his counsel upon the trial of this cause (Pages 83 and 84 Record).

The construction work in question was of large magnitude, involving the building of a railroad terminal in Spokane and an entrance into the same upon a route crossing the Spokane River with large bridges at two places in the city. Mr. J. R. Holman assumed exclusive charge of the work on the first day of January, 1913, as Chief Engineer of the Railroad Company (Page 86 Record). *"That the defendant offered to have the work covered by said sub-contract done by the plaintiff in accordance with said sub-contract,"* is specifically admitted and affirmatively alleged by the plaintiff in his pleadings in this case (Page 52 Record).

The plaintiff contends in his complaint, however, that the defendant refused to permit him to perform his contract and let the contract to another firm, to his damage in some Ninety Thousand Dollars (\$90,000.00). The defendant answers that it tendered the performance of the work to the plaintiff and that *he refused to perform in accordance with the terms of his said sub-contract*, but that he, the plaintiff, imposed upon the de-

fendant *as a condition of performance*, that the defendant finance him and furnish him the sand and gravel required for the construction work under consideration.

On or about the 10th day of March, 1913, the plaintiff and Mr. Holman took up the matter of this construction work under the contract in question and the plaintiff insisted that he was to do the work under the *arbitration agreement* (Pages 74-75 Record) and that under this arbitration agreement the Railroad Company would have to furnish him sand and gravel and the plaintiff further insisted that the general contractors was to finance him, that the Railroad Company having assumed the obligations of the general contractor would have to finance him (Page 75 Record). Thereupon the plaintiff left for Canada with full knowledge that this large work was impending and without calling upon Mr. Holman again until his return from Canada in the month of December following. In the meantime Mr. Holman took the plaintiff at his word and in the month of July, 1913, let the work to another contracting firm (Page 86 Record).

Upon the trial of this case the Court instructed the jury (Page 87-88 Record), in substance and effect that if they found from the evidence that the plaintiff imposed upon the defendant as a condition for the doing of the work that the defendant furnish him sand without cost to him or gravel without cost to him or imposed upon the Railroad Company the condition of financing the plaintiff, that then and in either of said contingencies, the plaintiff in making said demand and imposing

such condition thereby abandoned and breached the contract and that the defendant was excused from the performance of said contract by it.

Error in this case is predicated by the plaintiff upon the giving of this charge in light of this record and said alleged error is the only question presented by the plaintiff before this Court in this cause, except that the plaintiff does contend that there was a provision in the contract, Section 4 thereof, appearing on page 9 of the Record, which provided *a manner for the Railroad Company* to cancel the contract and that this manner was not pursued. This last question, however, is raised in this Court for the first time and was not called to the attention of the Court below.

Indeed, no error was assigned or complained of in the Court below with respect to the instructions now challenged or with respect to any of the assignments of error made in this Court. The record discloses (Page 91) that upon concluding his charge to the jury, the Court in the presence of the jury inquired of counsel of both parties as follows:

“THE COURT: Anything further, gentlemen?”

To which Mr. Plummer, of counsel for the plaintiff, then and there answered:

“MR. PLUMMER: I don’t think of anything, your Honor.”

Whereupon the jury retired on the 22nd day of April, 1915, and returned a verdict in favor of the defendant on April 23rd, 1915. Thereafter and on *May*

1st, 1915, the parties entered into a stipulation (Page 92 Record) to the effect that the plaintiff have thirty (30) days in which to take and file exceptions to the Court's instructions, and exceptions in writing were filed to the charge of the Court to the jury on *May 20th, 1915*, or *28 days* after the jury retired to deliberate upon the cause.

POINTS, AUTHORITIES AND ARGUMENT

I.

No exceptions cognizable by this Court are presented by this record and the judgment of the lower Court should be affirmed at the threshold of the case. This Court has consistently declined to review any assignment of error based upon any portion of the charge or instructions of the Court wherein the record fails to show affirmatively that timely exceptions were taken thereto "while the jury was at the bar."

Stone vs. U. S. 64 Fed. 667-677.

Bank vs. McGraw, 76 Fed. 930.

Western Union vs. Baker, 85 Fed. 690.

Beatson Copper Co. vs. Pedrin, 217 Fed. 43-44,
and see:

Star Co. vs. Madden, 188 Fed. 910.

Gladden vs. Gabbert, 219 Fed. 855-858.

Phelps vs. Mayer, 15 Howard 161.

U. S. vs. Carey, 110 U. S. 51.

Stewart vs. Wyoming Ranchie Co., 128 U. S.
383.

II.

It was not in the province of these litigants to make a record in this case. The record was already made before the stipulation was entered into and the purpose of a Bill of Exceptions is to preserve that record and present it in intelligent form for the consideration of the Appellate Court. It will be noted that the stipulation does not purport to consent that exceptions be taken as of the time when the jury was at the bar, nor does the stipulation pretend to afford to the plaintiff in error any other rights under the exceptions to be taken pursuant to the stipulation than such as might attach under the law and practice of the courts involved. Notwithstanding the stipulation the plaintiff in error has no exceptions in this record which this Court can entertain or recognize.

Price vs. Pankhurst, 53 Fed. 312. (Affirmed,
154 U. S. 513).

Western Union vs. Baker, 85 Fed. 691.

Star Co. vs. Madden, 188 Fed. 910-911.

Beatson Copper Co. vs. Pedrin, 217 Fed. 43-44.

Phelps vs. Mayer, 15 Howard 160-161.

The Supreme Court in the case last cited observes that the rule requiring exceptions to be taken while the jury is at the bar was required by the Statute of Westminster 2 and that it has been rigidly observed by the Supreme Court of the United States and by the various Circuit Courts at all times and under all circumstances. In discussing the matter in this Phelps case the Court says:

“Nor is this a mere formal or technical provision. It was introduced and is adhered to for purposes of justice.”

In Price vs. Pankhurst, *supra*, the Court of Appeals of the Eighth Circuit observes at page 313 as follows:

“The party who conceives the charge is erroneous in any respect and remains silent, will not be heard to point out the error after the trial; and a general exception to the whole charge, any part of which is good law, is equivalent to silence. The rule is mandatory. *Its enforcement does not rest in the discretion of the lower Court.* Its enforcement is essential to the proper and intelligent administration of justice.”

The case at bar affords less excuse for consideration than the case from which we have quoted because the record in the present case affirmatively shows positive acquiescence in the charge as given by the Court (Page 91 Record).

Referring to this rule requiring exceptions to the charge of the Court to be taken in the presence of the jury, the Court of Appeals for the Second Circuit in *Star vs. Madden*, *supra*, speaks as follows with respect to decisions of the Supreme Court of the United States on the subject (Page 911) :

“It sets forth the rule of practice *for all Federal Courts*; has been announced and reannounced many times and has been repeatedly applied in this Circuit.”

The record submitted to this Court in the Western Union Telegraph Company case (85 Fed. 691), discloses that the lower Court uniformly followed the practice in all cases of refusing to allow exceptions to be taken in the presence of the jury and would not have allowed exceptions to be taken in said case had it been asked, but that no request was made by either party in said case to take exceptions before the jury retired. The Court in disposing of the case cited with approval *Johnson vs. Garber* (73 Fed. 523), wherein it is stated (page 527) :

“and the fact that such practice obtained cannot give this Court power to consider an exception which was not reserved at the only time when, *under the law*, it could have been reserved, namely, at the trial, and while the jury were at the bar.”

The recent case of *Beatson Copper Co. vs. Pedrin* decided by this Court October 5th, 1914, is analagous

with the case at bar. With respect to the point under consideration we quote from 217 Fed., Page 44:

“The points mainly relied upon in argument by the counsel for the plaintiff in error relate to the giving and refusal to give certain instructions to the jury, which, upon reference to the record, we find we are precluded from considering, for the reason that the action of the Court in the respects complained of was not seasonably excepted to; the record showing that the case was submitted to the jury on the 11th of November, 1913, and that the defendant’s exceptions were not entered until November 14, 1913—the bill of exceptions reciting:

‘It having been stipulated between the attorneys for plaintiff and defendant in the presence of the jury before it had retired, and in the presence of the Court, that the plaintiff and defendant have until the 16th day of November, 1913, to make and take exceptions to instructions given and refused.’”

III.

Failure of the Court to charge the jury with respect to the effect of Paragraph 4 of Alverson’s contract Exhibit “A” cannot be raised in this Court for the first time. To entitle plaintiff’s contention in the matter to consideration, he was required to present the same to the Court below.

Phoenix Railway Co. vs. Landis, 231 U. S. 578-582.

Robinson & Co. vs. Belt, 178 U. S. 41-50.

Clark vs. Fredericks, 105 U. S. 4.

(a) Assuming for the purpose of argument only, that the exceptions of the plaintiff in error filed several weeks after the trial, are entitled to consideration, yet the point is not saved. It was the duty of the plaintiff in fairness to the Court and to opposing counsel to request an appropriate instruction with respect to this clause of the contract and in any event to call the matter to the Court's attention during the trial.

The Francis Wright, 105 U. S. 381-389.

Isaacs vs. U. S. 159, U. S. 487-491.

Humes vs. U. S. 170, U. S. 211.

Texas & Pacific Ry. vs. Volk, 151 U. S. 73-78.

We quote from the Wright case, *supra*, page 389:

“Every Bill of Exceptions must state and point out distinctly errors of which complaint is made. It ought also to show the grounds relied on to sustain the objections presented so that it may appear the Court below was properly informed as to the point to be decided.”

(b) The plaintiff is not entitled to invoke Paragraph 4 of his contract for two reasons, first: Said section contemplates cancellation by the Railroad Company at any time after the contractor has undertaken the work under and in pursuance of the contract. In this case *the contractor refused and declined to proceed with the work under the terms of the contract*, and, secondly: The Railroad Company did not cancel the contract nor declare the same void. *The plaintiff was the actor*. He imposed conditions not within the terms of the contract as a condition precedent to his proceeding with the work called for by it. He abandoned the contract when he insisted that he was taken care of in a different manner by the arbitration agreement and thereupon in effect told the Railroad Company that if he proceeded with the work, the Railroad Company would furnish without cost to him sand and gravel, and money for financing. He invited a rescission and when the Railroad Company accepted his stand in the matter as final and acted upon it by letting the work to another, a rescission was thereby accomplished.

IV.

A written contract may be abandoned or rescinded by parole and such abandonment or rescission may be inferred from the acts and declarations of the parties.

Chauteau vs. Jupiter Iron Works, 94 Mo. 388-395.

Hobbs vs. Columbia Falls Brick Co., 157 Mass.
109, 31 N. E. 756.

Stanford vs. McGill et al., 72 N. W. 938.

Davidor vs. Bradford, 129 Wis. 524, 109 N. W.
756.

Williams Cooperage Co. vs. Scofield, 115 Fed.
119-123.

The Massachusetts case cited is fairly illustrative of the above proposition. In that case plaintiffs entered into an executory contract with defendant to purchase from the latter a certain quantity of brick. Thereafter the plaintiffs became insolvent and made a voluntary assignment for the benefit of their creditors, of which they gave notice to the defendant. Four (4) months after giving this notice, they informed the defendant of their intention to claim performance under the contract. In the meantime the defendant had sold the brick. The trial Court held that sufficient defense was not made to excuse the defendant from performance, but the Supreme Court in reversing the case observed that the jury could properly have regarded the giving of notice of assignment as equivalent to plaintiffs' saying that they could not go on with their contract, especially when taken into consideration with other circumstances in the case and that the jury might well hold that the defendant was justified in the assumption that they had abandoned the contract. The case is not as strong as the

one under consideration here for the reason that in this case the plaintiff informed the defendant that if it permitted him to do the work it must pay additional consideration in the way of materials and finances. Manifestly, if after the plaintiff took up this proposition with the Chief Engineer of the defendant, the latter had assigned him to the work of prosecuting the contract, such action would have been an assent to the modified terms insisted upon by plaintiff and the defendant would have been compelled to respond to the additional requirements imposed.

V.

To recover for breach of contract it is elementary that the party must either perform or hold himself in readiness to perform his own stipulations as a condition precedent to his right of action.

Encyc. of the U. S. Supreme Court Reports,
Vol. 4, page 582, and cases cited in Note 15.

Elliott on Contracts, Section 1858.

VI.

Where one party to a contract imposes conditions not within the contract such conduct operates to excuse the other party from performing his part, the latter is excused for non-performance.

U. S. vs. Peck, 102 U. S. 64.

Williams Cooperage vs. Scofield, 115 Fed. 119-123.

Stanford vs. McGill, 72 N. W. 939.

Smoot's Case, 82 U. S. (15 Wallace) 36-47.

Lake Shore & M. S. R. Co. vs. Richards, 152 Ill. 59, 30 L. R. A. 1-53.

King vs. Faist, 161 Mass. 449, 37 N. E. 456.

Wald's Pollock on Contracts, 3rd Edition, page 338.

We quote from the text of the authority last cited:

"Where no performance has been rendered. While it is ordinarily the case that a party who seeks to rescind or avoid a contract because of a breach of contract or repudiation by the other party has performed at least in part and desires restitution of what he has given or its value, yet it seems to follow that the same course is open to one who has not performed at all. Such a person will not wish ordinarily to avoid the contract altogether, because that course would deprive him of any right of action whatever. He could seek neither restitution, because he had given nothing, nor compensation in damages for breach of the contract, because he had put an end to the promise on which he must sue. Nevertheless, there are many cases where the injured party is content merely to terminate his legal relations with the other party to

the contract without more. That he may do this is perhaps intimated by Parke, B., in *Phillpotts vs. Evans*, 29; it is expressly stated by Compton, J., in *Hochster vs. De La Tour*, 30, where the repudiation preceded the time for performance by either party. It was so decided in *King vs. Faist*, 31. There the plaintiff had stated he would not perform unless the defendant gave a guarantee which the contract did not require; whereupon the defendants wrote that they would not perform, and they did not. The plaintiffs sued for this failure to perform, but the Court held it justified, saying: 'Before the defendants were in default under the substituted contract, or had notified him of an intention not to perform it, he himself repudiated it by notifying them that he would not perform it on his part, and thus gave them the right to rescind the contract.' "

and from the *Lake Shore* case, 30 L. R. A. 53:

"It would seem clear, on principle, that a mere declaration of the party of an intention not to be bound, or acts and conduct in repudiation of the contract, will not, of themselves, amount to a breach, so as to create an effectual renunciation of the contract; for one party cannot, by any act or declaration, destroy the binding force and efficacy of the contract. *Kadish vs. Young*, *supra*. As said by Bowen, L. J., in *Johnstone v. Milling*, L. R. 16 Q. B. Div. 460: '*Its real operation appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen*, holding fast to the contract to wait till the time for its performance has arrived, or to*

act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. . . . If he does so elect, it becomes a breach of contract, and he can recover upon it as such.' Upon the election to treat the renunciation, whether by declaration or by acts and conduct, as a breach of a contract, the rights of the parties are to be regarded as then culminating, and the contractual relation ceases to exist, except for the purpose of maintaining the action for the recovery of damages."

There are few authorities (Massachusetts, North Dakota and Nebraska) which decline to recognize the English rule of anticipatory breach announced in *Hochster vs. De La Tour*, 2 El. & Bl. 678, but insofar as we have been able to ascertain from a reasonably thorough search, we find the principle above announced to be uniformly recognized and approved. The confusion and controversy arises over an attempted classification of the cases; some referring to certain lines of cases as illustrative of "breach" of contract while others refer to the contract as having been "rescinded" or "abandoned"; for instance, Chief Justice Corliss in his exhaustive opinion in the *Stanford-McGill* case, wherein he feels constrained to criticise the reasoning and conclusions arrived at in the English case referred to, says:

"Many of the cases which appear to support the doctrine of the *Hochster*

case are distinguishable on this ground of rescission."

but he likewise observes as follows:

"When one party to an agreement has violated its obligations in a particular that goes to the root of the agreement, then it is true that the other party may treat his conduct as an offer to rescind, and may acquiesce in the desire so manifested to abandon the contract. In such a case the parties unite in a mutual release of the obligations which reciprocally bind them. So, too, when one party to an agreement expresses, even before the time for performance has arrived, his desire to escape the burdens of the agreement, he thereby offers to discharge the other party from the obligations thereunder resting upon him; and such party may treat such conduct as an overture for rescission, and assent thereto."

VII.

It is immaterial in this case whether the words, acts and conduct of the plaintiff in error be stenciled as "breach," "anticipatory breach," "renunciation," "rescission," "abandonment," or with some other term. The real question is whether the acts and conduct of the plaintiff evinced an intention to be no longer bound by the contract **ACCORDING TO ITS TERMS** and if the plaintiff imposed **AS A CONDITION** for the prosecution of the work that the Railroad Company furnish gravel and sand and afford him financing, then he did evince

an intention to be no longer bound **BY THE TERMS** of the contract upon which he has based his action. The question whether such ^{condition} ~~contention~~ was imposed was the question submitted by the Court to the jury in this case and in so doing no error was committed.

Brady vs. Oliver (Tenn.) 41 L. R. A., N. S.
60-66.

O'Neill vs. Supreme Council (N. J.), Pitney J.
57 Atlantic 463-465.

Roehm vs. Horst, 178 U. S. 1-8 et seq.

Michigan Yacht & Power Co. vs. Busch, 143
Fed. 929-932 (Circuit Court of Appeals 6th
Circuit, Lurton, C. J.).

Hayes vs. City of Nashville, 80 Fed. 641-649
(Circuit Court of Appeals 6th Circuit, Taft,
C. J.).

Daniels vs. Newton, 114 Mass. 531.

Ballou vs. Billings, 136 Mass. 307-309 (Holmes,
J.).

Curtis vs. Gibney, 59 Md. 131-155.

Bell vs. Hoffman, 92 N. C. 273-277.

Armstrong vs. St. Paul, etc., Co. (Minn.), 50
N. W. 1029.

The plaintiff not only imposed the conditions at the time he held his conference with Mr. Holman in the spring of 1913, at which time the plan and work for this terminal were being developed, but he continued to insist upon this condition through the succeeding months and *he even goes upon the stand in this case and boasts of his conduct and boldly asserts that he was right and* by his manner and testimony in effect states that he is still insisting upon the conditions he imposed. At no time has he recalled any of the conditions thus imposed and insisted upon but he has let his words stand and has gone upon the witness stand and re-affirmed them. There has been no tender of performance—no disposition to perform. He was gambling with his contract when he had his conference with Mr. Holman in the month of March, 1913, and the jury certainly entertained that view of the situation. He was also speculating in this case when with much confidence his attorney approved the charge of the Court and let the record stand unchallenged when the jury retired, and then seeks to back into Court upon the return of an adverse verdict. Will this Court say after the reception this gentleman gave Mr. Holman in March, 1913, that he, Mr. Holman, as Chief Engineer of this Railroad Company must hold the prosecution of this large work in abeyance until he could go and plead with Mr. Alverson to recall the conditions that he had so insistently imposed upon him before he went to Canada? Can this man leave an ultimatum of this kind in the door of a Chief Engineer, depart from the country and pay no attention to

the work until it is more than one-half completed and then be heard to say, as his counsel has done on page 12 of the brief and notwithstanding his testimony upon the stand, that he was merely expressing an opinion upon the construction that should be placed upon his contract; that he was simply indulging "*in mere talk*" before the arrival of the time for performance?

True the text writers endeavor to announce certain rules to invoke in the determination of the question as to what constitutes a legal breach or a legal rescission but as stated by Mr. Justice Holmes in the case of *Ballou vs. Billings*, *Supra*, page 309:

"It is clear that, apart from technical considerations, so far as the right to rescind goes, notice that a party will not perform his contract has the same effect as a breach."

and while the Courts have divided on the question as to whether a contract can be breached so as to afford a cause of action before the date stipulated for performance, some, and the great majority including the Supreme Court of the United States (*Roehm vs. Horst*, 178 U. S. 1) taking the affirmative and applying the English rule announced in *Hochster vs. De La Tour*, 2 El. & Bl. 678 and *Frost vs. Knight*, L. R. 7 Ex. 111, and others in the minority asserting in the negative on the reasoning employed in *Daniels vs. Newton*, 114 Mass. 531, and *Stanford vs. McGill*, but all are in accord to the effect that if a party to a contract serves notice

upon the other by word or deed before or after time for performance that he will not perform, or imposes as a condition an increase of price or other obligation, then the latter may take him at his word and treat the contract as rescinded. Even the Massachusetts rule recognizes this right; we quote from the leading case of *Daniels vs. Newton* at page 533:

“A renunciation of the agreement by declarations or inconsistent conduct, before the time of performance, may give cause for treating it as rescinded, and excuse the other party from making ready for performance on his part, or relieve him from the necessity of offering performance in order to enforce his rights. *It may destroy all capacity of the party, so disavowing its obligations, to assert rights under it afterwards, if the other party has acted upon such disavowal.* But we are unable to see how it can, of itself, constitute a present violation of any legal rights of the other party, or confer upon him a present right of action. An executory contract ordinarily confers no title or interest in the subject matter of the agreement. Until the time arrives when, by the terms of the agreement, he is or might be entitled to its performance, he can suffer no injury or deprivation which can form a ground of damages. There is neither violation of right, nor loss upon which to found an action. The true rule seems to us to be that in order to charge one in damages for breach of an executory personal contract, the other party must show a refusal or neglect to perform, at a time when and under conditions such that he is or might

be entitled to require performance. *Frazier vs. Cushman*, 12 Mass. 277. *Pomroy vs. Gold*, 2 Met. 500. *Hapgood vs. Shaw*, 105 Mass. 275. *Carpenter vs. Holcomb*, 105 Mass. 280. Such undoubtedly was the interpretation of the common law in all the earlier decisions. *Phillpotts vs. Evans*, 5 M. & W. 475. *Ripley vs. McClure*, 4 Exch. 345. *Lovelock vs. Franklyn*, 8 Q. B. 371."

Compliance with a contract contemplates a compliance according to its legal effect. From page 277 of the North Carolina case above cited the following:

"The plaintiff was bound to comply with the agreement *according to its legal effect; he failed to do so at his peril*; and his failure and refusal to deliver the goods on the day specified, was non-compliance with it. His claim that ten per centum should be added to the prime cost price of the goods was obviously unfounded. The plain terms of the agreement, left nothing to doubt, the prices to be paid were fixed, and they were the 'wholesale prices as per invoice from G. Oppenheimer & Son.' Any question as to prime costs and ten per centum added thereto, was outside of and foreign to the agreement.

It seems that the plaintiff thought so himself, for afterwards, on the same day, he proposed to abandon his demand. This proposition came too late; several hours before he made it, he had refused to comply with the agreement; one flat refusal was enough."

and from the Armstrong case (Minn.), 50 N. W. 1029:

“That, where one party to an executory contract repudiates it by refusing to be bound by its terms, the other party may take him at his word, and act upon it by treating the contract at an end, and bring an action for damages for its breach, is, of course, elementary. The only question is, what will constitute a repudiation? The true test, stated generally, is whether the acts and conduct of the party evinced an intention no longer to be bound by the contract; and the fair result of the authorities is that it is not only an absolute refusal in words to perform a contract, but also any clear manifestation by words or acts of an intention *not to perform it according to its terms, that will authorize the other party to treat this as a repudiation and bring his action.* Consequently, where the seller receives notice from the buyer that he will not pay the contract price for the goods, he has a right to treat this as a repudiation of the contract, stop delivery, and bring his suit for damages. This is, in our opinion, just what the evidence in this case conclusively established. The contract price of the coal was one sum. The plaintiffs, in effect, said to defendant: ‘We will only pay for it another and less sum; in other words, if you go on and perform your side of the contract, we will not perform ours. You must go on and deliver the coal, but we will not pay you for it, as under the contract we ought.’ The legal effect of this was not changed by the fact that it was coupled with a profession that they were ready and willing to perform the contract, for *manifestly the ‘contract’*

which they asserted their willingness to perform was not the contract of the parties, but an entirely different one. Neither did it make any difference, so far as concerned defendant's right to act on this as a repudiation, that it might not have been willful or fraudulent, but the result of a mistake as to the terms of the contract. *In planting themselves on their own construction of it, the plaintiffs took their chances; and, as it was in fact incorrect, they must stand the legal consequences of their acts.* It is doubtless true that there may be acts of default in the performance of the strict terms of a contract which would not evince any intention to repudiate its obligations, and which consequently the other party would have no right to treat as a repudiation. An example of this is *Iron Co. vs. Naylor*, L. R. 9 App. Cas. 434, cited and relied on by plaintiffs. But this is clearly not such a case. There are also cases where one party, before the day of performances arrives, gave notice that he would not perform his contract, and yet the other party was held not entitled to recover damages, on the ground that he had not acted on the notice as a repudiation, but treated the contract as still on foot. *Avery vs. Bowden*, 5 El. & Bl. 714, also cited by plaintiff, is an instance of this kind. But these cases turn on the fact that the party had not acted on the notice, which, as is said in one case, amounts to nothing until the time when the buyer ought to receive the goods arrives, unless the seller acts on it in the meantime. In the present case the defendants did act on the notice, and

treated it as a repudiation of the contract, and stopped delivering the coal."

and from *Withus vs. Reynolds*, 2 Barnewall & ad 882, Lord Tentenden, C. J.

"I am of opinion that the plaintiff is not entitled to recover. There is, I think, no doubt that by the terms of this agreement the plaintiff was to pay for the loads of straw as they were delivered. If that were not so, the defendant would have been liable to the inconvenience of giving credit for an indefinite length of time, and, in case of non-payment, ^{bring} ~~being~~ an action for a very large sum of money, which does not appear to have been intended by the contract. Then the only question is, whether upon the plaintiffs saying, 'I will not pay for the goods on delivery,' it was incumbent on the defendant to go on supplying straw, and he clearly was not obliged to do so."

The case of *Kadish vs. Young*, 108 Ill. 170, 43 Am. Reports 548, 30 L. R. A. 49-50, is to the effect that a seller of grain on receiving notice from purchaser that the latter would not be bound by the contract was not *bound* to act upon the notice, but was entitled notwithstanding, to tender, etc., on day for delivery fixed by the contract *but the Court will recognize the doctrine that the party receiving the notice might have acted upon it, and accepted and treated the contract as broken.*

In the *Michigan Power Company* case, Judge Lurton, speaking for the Circuit Court of Appeals of the Sixth Circuit (pages 932-933), says:

“When the question is whether one party is relieved from the performance of his part of the contract by the conduct of the other in failing to make a payment when it was due, we must look to all of the circumstances of the case to see whether that conduct amounts to an out and out refusal to perform the contract. This is the substance of what is said in *Withers vs. Reynolds*, 2 B. & Ad. 882, 885; *Freeth vs. Burr*, cited above; *Mersey Steel Co. vs. Naylor*, L. R. 9, App. Cases 434, 438; *Norrington vs. Wright*, 115 U. S. 188, 210, 6 Sup. Ct. 12, 29 L. Ed. 366, and by this court in *Cherry Valley Iron Works vs. Florence Iron Co.*, 64 Fed. 569, 572, 12 C. C. A. 306, and in *Monarch Cycle Co. vs. Roger Wheel Co.*, 105 Fed. 324, 44 C. C. A. 523. Mere non-payment of an installment when due is an element of importance, and in some circumstances may evince a renunciation of the contract. But this case, as shown by the correspondence and other evidence, was not a simple case of omission to pay as the plaintiff was bound to do, but was a positive refusal to perform the contract upon his part *unless the defendants would give him a security they were under no obligation to give. That he was willing to have the contract carried out if the defendants would accede to his terms and do what they were not obliged to do does not help the case but only serves to emphasize his determination not to carry out the contract as it was written, and justified the defendants in treating the plaintiff as having renounced the agreement.*”

In the *Roehm-Horst* case, 178 U. S., the Court calls attention to the different footing upon which money contracts, pure and simple stand, as compared with executory contracts for the purchase and sale of goods (page 18) and it seems to us that executory construction contracts carrying interdependent obligations and requiring execution as a whole may well be distinguished from contracts involving the sale and purchase of goods.

True a different legal principle would probably not be involved, but in a contract like the one under consideration involving large engineering problems and requiring months for execution, the party calling for the construction to be done would be much more readily justified in treating the other party's refusal to perform according to the terms of the contract as a rescission and abandonment, or in other words, taking him at his word, than in a case wherein a commodity that was available in the market was being contracted for. The Supreme Court in the case just referred to quotes the *Hochster-De La Tour* case approvingly, criticises and declines to follow the Massachusetts case of *Daniels vs. Newton* and then observes (page 19):

“The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due. If it appear that the party who makes an absolute refusal intends thereby to put an end to the contract so far as performance

is concerned, and that the other party must accept this position, why should there not be speedy action and settlement in regard to the rights of the parties? Why should a locus penitentiae be awarded to the party whose wrongful action has placed the other at such disadvantage? What reasonable distinction per se is there between liability for a refusal to perform future acts to be done under a contract in course of performance and liability for a refusal to perform the whole contract made before the time for commencement of performance?"

Now if it is true that we were entitled to maintenance of contractual relations up to the time for performance as well as to performance, can counsel successfully assert that we were receiving the "maintenance" of contractual relations under Exhibit "A" pleaded by him in this case as a foundation for his recovery when the plaintiff himself admits that he insisted upon terms other and more burdensome than imposed by the contract not only at the time he was discussing its performance with Mr. Holman, but even up to and including the trial?

VIII.

We do not consider it necessary for the decision of this case that the Court harmonize or review the multitude of decisions upon the question of breach and rescission of contracts, but assert the proposition that even if counsel's contention be entertained that plaintiff was

simply expressing loose and untenable views that he did not mean to insist upon, **YET HIS CONDUCT PRECLUDES HIM FROM ASSERTING ANY CAUSE OF ACTION AGAINST THE DEFENDANT IN THIS CASE.**

Armstrong et al. vs. St. Paul & Pacific Coal Co.,
50 N. W. 1029.

Smoots case, 15 Wallace 36-47.

Wald's Pollock on Contracts, 3d Ed., Page 338.

In the Armstrong case the Court recognizes that there are cases where the action of one party to a contract would be such as to constitute defense if the other party was sued for failure to perform and yet not sufficient to authorize the latter to abandon the contract himself and as plaintiff, recover profits which he would have made if the contract had been fully performed.

In the Smoots case claimant entered into a contract with the war department to furnish and deliver cavalry horses within a stated period. After the contract was entered into the mode of inspecting horses was changed and the Government imposed regulations entirely unreasonable and unenforcable involving, among other things, the branding of rejected horses with an "R." The plaintiff claimed that in view of these regulations owners would not sell him horses subject to the inspection and that the procedure constituted

a fraud by the inspectors and excused him from tendering performance or submitting horses for inspection. The Court rejected his claim for speculative profits, but in doing so observed as follows:

“We are also to remember that the question to be considered is not whether the action of the cavalry bureau would have been a defense if the claimant had been sued for a failure to perform his part of the contract, but whether it was sufficient to authorize him to abandon the contract himself, and as a plaintiff recover against the other party the profits which he would have made if it had been fully performed.”

The old case of *McCasken vs. Smith*, 16 La., Rep. 32, wherein the substance of the decision is stated in the syllabus as follows:

“Where a workman, by the job, demands more than is authorized by his contract, and, on being refused, leaves his work uncompleted, the adverse party may immediately employ other workmen to complete the job, and the former cannot recover, even if he returns and afterwards offers to perform the work.”

was good law and even-handed justice in 1840, and ever since has been and is, we think, the proper rule of law to apply in the case at bar.

IX.

If one of two contracting parties is prevented from performing by the act or conduct of the other, the latter is excused from tendering performance.

Turner vs. Parry, 27 Ind. 163.

Phoenix, etc., Ins. Co. vs. Hinesley, 75 Ind. 1.

Mathis vs. Thomas, 101 Ind. 119.

CASES CITED BY PLAINTIFF IN ERROR

Colby vs. Reed, 99 U. S. 560, why cited or of what application to a case wherein renunciation and rescission of an executory construction contract is claimed, we are unable to comprehend. It was a case wherein the parties joined in a \$200,000.00 stock subscription of which the plaintiff's share was \$45,000.00; a further subscription of \$100,000.00 from them was called for and plaintiff could not pay his share, whereupon they agreed that defendant would make the additional subscription alone and that plaintiff would transfer to defendant \$5000.00 of his, the plaintiff's stock; the latter also pledged additional shares, \$8000.00 worth, to defendant to secure a loan of \$2000.00. The plaintiff brought action against defendant for the stock in his hands to the amount of \$45,000.00; the defendant claimed that having demanded \$13,000.00 more than he was entitled to, plaintiff could recover nothing.

The principle announced by the Court in disposing of the case is stated in the syllabus as follows:

“Where the amount to which the plaintiff is entitled is clear, an action by him for a breach of the contract will not be defeated solely on the ground that his demand upon the defendant was in excess of that amount.”

Smoot’s case, 82 U. S. 37 (involved the law of sales of personal property, and with respect to same the Court quotes approvingly from Benjamin on Sales to the effect:

“A mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient; it must be a distinct and unequivocal, absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end.”

Dingley vs. Oler (117 U. S. 491) is another case of personal property sale.

In 1879 “O” contracted the sale of a cargo of ice to “D” from the former’s house “next year.” In July, 1880, “D” demanded the ice and “O” refused to make the delivery at that time but asked for reply to his letter and requested a personal interview. “D” sued without making reply either in person or by letter.

The case was tried without a jury and the Supreme Court held:

“The present action was prematurely brought before there had been a breach of the contract, even in this sense, by the defendants, for what they said on July 15th amounted merely to a refusal to comply with the particular demand then made for an immediate delivery.”

Armstrong vs. Ross, 55 S. E. 895, was a case wherein the parties were in dispute as to the proper construction of a contract for the sale of coal land. Just what took place or what the dispute was does not appear except that Armstrong was apparently claiming more land than his contract entitled him to. He was claiming, however, *under his contract and sought specific performance of his contract*. The Court denied Ross' contention that the making of a claim for too many acres by Armstrong operated to relieve him, the vendor, from conveying any.

Stanford vs. McGill, 72 N. W. 938, conceded by plaintiff in error not to be in point of the facts.

Emack vs. Hughes, 52 Atl. 1061.

This also is a case of sale of personal property. Both parties entered into and participated in the performance of it, but became involved in controversy. Plaintiff wrote a letter to defendant stating:

“If you don't ship my orders to the exclusion of all others, until you have reim-

bursed me for advances, I shall put the matter in the hands of my attorney in Vermont and let him do the settling."

The Court held that the latter did not constitute a breach of the contract, and then observed as quoted on page 20 of Brief of Plaintiff in Error. Manifestly there is nothing in this case helpful to the Court in passing on this case.

Ga Nun vs. Palmer, 96 N. E. 100.

"G" entered into a contract with "S" to care for her during her life for which "S" promised to pay \$70.00 per month and \$20,000.00 to be paid upon the death of "S." After a few months "S" left "G" and lived the remainder of her days with "P" to whom she transferred her property. "G" sued "P" and the latter contended that "S" breached the contract when she left "G" and that the statute of limitations ran from that date. The Court held in effect that it was optional with "G" to recognize the renunciation involved in the departure of "S" and sue for damages *or* treat the same as inoperative thereby keeping the contract alive until the death of "S." The latter course having been pursued by "G" it was determined that the statute commenced to run from the date of death.

Lundahl vs. Hansem, 35 N. E. 741, fairly illustrates how we may be misled by following some proposition of law stated in a general way and not presented with the facts in the case wherein the language is employed.

In this case "H" contracted to sell, and "L" to purchase certain land on an installment contract. "H" extended the time for the payment of a given installment, but his agent in "H's" absence, refused to recognize the extension and declared the contract forfeited. "L" refused to treat the contract as at an end and "H" offered to go on with the contract. "L" instituted suit to cancel the agreement and the Court held no showing was made to justify interposition of equity to cancel, but that "L's" remedy was either a suit to compel specific performance or an action at law on the contract, for its breach.

Bell vs. Maximos, 19 S. W. 1070-1072

Was a case of agency wherein defendants were buying cotton for plaintiff. Plaintiff demanded invoice of their purchases and defendants apparently claimed repudiation of the contract for the reason that same did not, according to their contention, require the furnishing of the invoices. The Court held that when the defendants purchased the cotton for the use and benefit of the plaintiff, it thereupon became his property and the defendants were therefore required to account to the plaintiff for proceeds realized from the sale of same.

We submit that the judgment of the District Court in this case should be affirmed.

**W. W. COTTON and
A. C. SPENCER,**
Attorneys for Defendant in Error.

No. 2703

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

J. L. ALVERSON,

Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAV-
IGATION COMPANY, a Corporation,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

*Upon Writ of Error to the District Court of the
United States, Eastern District of Wash-
ington, Northern Division.*

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ARGUMENT.

I.

Opposing counsel contend that the exceptions to the charge of the court, filed pursuant to the written stipulation signed by them, are insufficient to preserve the questions thereby sought to be raised.

We have long been cognizant of and have no quarrel with the decisions of this and other fed-

eral courts, rendered in the absence of any specific rule, to the effect that exceptions to a charge, in order to be available, must be made before the retirement of the jury to consider its verdict. These decisions, in consequence of rule 58 of the trial court (Revised rules of the U. S. Circuit Court and U. S. District Court of the District of Washington, p. 49) have no bearing whatever on the present controversy. Said rule is as follows:

“Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the court, after the jury have retired to consider of their verdict, and if practicable before the verdict has been returned, that such party excepts to the same, specifying by numbers of paragraphs or in any other convenient manner the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to; whereupon the Judge shall note such exceptions in the minutes of the trial or cause the reporter (if one is in attendance) so to note the same.”

These rules were promulgated by the judges of this court in 1904, pursuant to Section 918, U. S. Revised Statutes (U. S. Comp. St., p. 685; 4 Fed. Ann., p. 585).

A certificate of adoption appearing on page 79 of the published rules is as follows:

“**ORDERED**, That the foregoing rules be, and they are hereby adopted as the rules of the

Circuit Court of the United States of the Ninth Judicial Circuit, in and for the District of Washington; that said rules take effect and be in force on and after Saturday, the 31st day of December, 1904; and that all rules heretofore adopted be repealed, said repeal to take effect on the day aforesaid.

Adopted....., 1904.

WILLIAM B. GILBERT,
ERSKINE M. ROSS,
WILLIAM W. MORROW,

United States Circuit Judges, for the
Ninth Judicial Circuit."

While on page 81 of the same publication, we find the following:

"The Rules of the Circuit Court in and for the District of Washington, shall be the rules of practice governing the transaction of business in this Court; the admission of attorneys to practice; the conduct of the officers of the Court; the proceedings in actions at law, suits in equity and criminal prosecutions, and all other matters not otherwise provided for."

These rules, including rule 58, ever since their adoption, have been and now are the rules of practice and procedure in the District Court of Washington.

Mahr v. Union Pac., 140 Fed. 921, 925.

Section 918, U. S. Revised Statutes, is as follows:

“The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court, under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the making of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings. (4 Fed. St. Ann. 585.)”

Rules of procedure adopted by the Circuit and District Courts in pursuance to the foregoing statute have the force and effect of law, unless inconsistent with the statutes of the United States or the rules of the Supreme Court.

Amer. Graphophone Co. v. Nat. Phonograph Co., 127 Fed. 350.

Bryant Bros. Co. v. Robinson, 149 Fed. 321.

United States v. Barber Lumber Co., 169 Fed. 184.

Shepard v. Adams, 168 U. S. 625.

Speaking not of rule 58, here involved, but of another one of the 98 rules adopted by this court at the same time, and distinguishing between the purpose and effect of Sections 914 and 918 of the Statutes, the late Judge Whitson, in the case of

Mahr v. Union Pac. R. Co., 140 Fed. 921, 925, said:

“This is one of the rules adopted by the circuit judges of the Ninth Judicial Circuit upon December 31, 1904, and is and has been in force in this state (Washington) ever since.

The argument is that Section 914 of the Revised Statutes (U. S. Comp. St. 1901, p. 684), which provides that the practice, pleadings, etc., in the Circuit and District Courts shall conform as near as may be to the practice, pleadings and forms at the time in like causes in the courts of record of the state within which said Circuit or District Courts are held, must govern the court in this matter of practice. But there is no statute in this state regulating such appearance, nor is there any practice governing the matter other than that applicable wherever special appearances are allowed. Section 918 of the Revised Statutes (U. S. Comp. St. 1901, p. 685), expressly provides that the Circuit and District Courts may, in any manner not inconsistent with any law of the United States or any rule prescribed by the Supreme Court, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, ‘and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in purpose of allowing rules to be made in cases similar to the one at bar, and so it has been held in numerous cases.’ ”

A question very similar to the one at bar, concerning the validity and effect of a rule of the Circuit Court for the Southern District of California,

requiring requests for special instructions to be presented to the court at the close of the evidence and calling for a construction of Section 918 of the Statute, was presented to this court in *Atchison etc. Ry. Co. vs. Hamble*, 177 Fed. 644, 652. Judge Morrow, in upholding the rule, said:

“It is next contended that the court erred in refusing to receive and consider certain special instructions on behalf of the defendant; such refusal being based upon the ground that the requested instructions had not been handed to the court within the time provided in a rule of the court providing that:

‘Any special charges or instructions asked for by either party must be presented to the court in writing directly after the close of the evidence and before any argument is made to the jury, or they will not be considered.’

The requested instructions were not presented at the close of the evidence, but after the close of the argument and the court was about to instruct the jury. The Circuit Court has power to make such rules regulating its ‘practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings.’ Rev. St., Sec. 918 (U. S. Comp. St., p. 685). The rule requiring instructions to be presented to the court at the close of the evidence and before argument is of that character.”

Sustaining a rule providing that, if any execution against property be returned wholly or partly unsatisfied, the execution plaintiff might obtain *ex parte* an order for the examination of the execu-

tion defendant and such other persons as might be shown to be material, and further providing that, if deemed proper, on consideration of the evidence an execution be taken in accordance with the practice in respect to bills of discovery, the Circuit Court of Appeals for the Second Circuit took occasion in *Walker vs. Monad, etc.*, 196 Fed. 206, to say:

“The rule is an excellent one, and should be sustained if the District Court had the power to make it. Section 918 of the U. S. Revised Statutes (U. S. Comp. St. 1901, p. 625) reads as follows: * * * Since we regard this new rule as being merely a regulation of practice in the court, which, if not absolutely necessary, is certainly convenient for the advancement of justice and the prevention of delays and it does not appear to be inconsistent with any provision of statute of any Supreme Court rule, we are satisfied that the District Court had the power, under Section 918, to enact it.” (196 Fed. 208.)

See also, *In re Kinney*, 202 Fed. 137.

It is not contended by defendant that there is any Federal Statute or rule of the Supreme Court prescribing the time and manner of taking exceptions to instructions, but simply, as is well known, that the practice of taking exceptions while the jury is still at the bar has grown up in this country in conformity with the Statute of Westminster 2. It does not seem therefore that any serious question could exist in regard to the validity of

the rule here presented, since Section 918 of the Statute provides that the Circuit and District Courts may make such rules and orders regulating their own practice as may be necessary or convenient, provided only that such rules be “not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court.” The only question therefore is as to the interpretation and application of said rule to the case here presented.

In considering rule 58, it is to be noted, at the outset, that the taking of exceptions before the jury retires is thereby inferentially prohibited, since said rule specifically provides that exceptions “may be taken * * * after the jury have retired to consider of their verdict, and if practicable, before the verdict has been returned.” Hence, it is clear, if the rule has any effect at all, that exceptions cannot be properly taken until after the jury has retired, and furthermore, that valid exceptions may be taken after a verdict has been returned, the time of taking exceptions being left optional and dependent entirely on considerations of practicability. The instructions here in question were given orally by the trial court. Opposing counsel do not contend that it was practicable to have entered exceptions before the return of the verdict, and by their stipulation in writing, they have for-

ever estopped themselves from asserting such a claim.

We quite agree with opposing counsel that it is never competent for parties litigant to direct the practice of a court in a channel violative of its own affirmative rules of procedure.

Here, however, rule 58 contemplates by its plain wording that exceptions to a charge may be taken after the return of a verdict. Counsel stipulated in writing filed in the case (Record, p. 57) that such exceptions might be filed at any time within thirty days, and exceptions filed in pursuance with such stipulation (Record, pp. 160-66) were set out in *haec verba* in the motion for a new trial (Record, p. 58), and the bill of exceptions certified by the trial court specifically states that plaintiff's exceptions were allowed (Record, p. 95). We, therefore, know that the errors now complained of in the instructions were called to the attention of the trial judge before the entry of final judgment, and that he was thus given an opportunity to rectify those errors by granting a new trial, instead of entering judgment on the verdict.

This is all that was necessary under the reformed procedure. *State v. Peeples*, 71 Wash. 451, 459; 129 Pac. 108, 112.

In principle the situation here is identical with

that presented by *In re Chateaugay Ore & Iron Co.*, 128 U. S. 544.

In that case, amendments to a bill of exceptions, pursuant to a stipulation, were served and filed after the expiration of the period provided therefor by the rules of the Circuit Court. Objection was afterwards made to said amendments on the ground that they had not been served and filed within the prescribed period, in answer to which the Supreme Court of the United States, holding the parties estopped from objecting by their stipulation, said:

“In the present case, the defendant prepared and served its bill of exceptions within the 40 days from January 25th. The expression ‘prepare and serve,’ in the order allowing the 40 days, clearly meant, in view of rules 67 and 69 of the Circuit Court, that the proposed bill was to be prepared and served on the opposite party within the 40 days, so that he might propose amendments to it within the time prescribed by the rules. It was so prepared and served within the 40 days. It was retained by the plaintiff for 10 days after its service. He then obtained, by stipulation, from the defendant, 10 days’ more time to prepare and serve amendments. The proposed amendments were served on the tenth day, and the notice of settlement was accepted, written admission of its service was given, and it was retained. Under these and the other circumstances above detailed, we think the defendant was entirely regular in its practice, and that the plaintiff

was estopped from raising the objection which he made before Judge Shipman.”

We, therefore, contend that the exceptions to the instructions here in question were taken and entered not only within the time contemplated by rule 58 and the written stipulation of the parties, but also that defendant, by reason of said stipulation, is at this time estopped from making objection.

Furthermore, in view of rule 58, counsel for defendant committed error in stating his exceptions to the charge of the court in the presence of the jury, and before it had retired, as page 91 of the record discloses was done. Mr. Plummer, of attorneys for the plaintiff, was on the other hand, entirely within the rule in answering, “I don’t think of anything, Your Honor,” in response to an inquiry of the Court, since he was forbidden by the rule referred to from taking exceptions at that time.

II.

Rule eleven of this Court provides, “but the Court, at its option, may notice a plain error not assigned.”

While we do not find that this rule has been construed by this Court in connection with a failure to take proper exceptions to instructions, yet it has been so considered in other jurisdictions, and held

to authorize and justify the consideration on appeal or error of a "plain error" in the charge to the jury, though not excepted to in the lower court.

This identical proposition appears to have been presented to the Circuit Court of Appeals for the Fourth District in *Western North Carolina Land Co. v. Scaife*, 80 Fed. 352, 357, where it is said:

"* * * we are of the opinion that the case is one which would with propriety justify, and should in justice require, this court to exercise that discretion which its eleventh rule allows in its concluding words, "but the court, at its option, may notice a plain error not assigned.' So, even if we were in doubt whether the exceptions did in due form assign the errors complained of, we would feel ourselves impelled to exercise that option, which is to be rarely and reluctantly invoked, and notice the plain errors and omissions in the charge of the presiding judge."

And the same ruling was made by the Circuit Court of Appeals in *White v. United States*, 202 Fed. 501, the precise question being that the lower court omitted to instruct the jury as to their duty to allow or not to allow interest.

To the same effect see:

San Antonio Tract Co. v. Yost, 88 S. W. 428.

Hopper v. Dodd, 70 S. W. 223.

Evants v. Erdman, 153 S. W. 229.

We, therefore, contend, though it be conceded for

the sake of argument that proper exceptions to the instructions complained of were not taken below, that the error of the trial court in submitting to the jury the question of whether or not Alverson breached or abandoned his contract, in the face of paragraph four thereof specifically requiring the giving of a written notice ten days in advance as a condition precedent to cancellation and the letting of the work to third parties, is error so obvious and fundamental that it should be noticed and corrected by this court in the furtherance of justice, even though it be held that no proper exceptions were taken below. This is especially true in view of rule 58, which, though it be not construed to authorize the filing of exceptions after the return of a verdict, even when stipulated for by the parties, must nevertheless be conceded to be so worded as to lead the average practitioner to believe, in the absence of a contrary judicial interpretation, that all rights would be preserved by the practice followed in the present instance.

III.

Defendant's contention that paragraph four of Alverson's contract was not called to the attention of, or considered by the lower court, and that it cannot now be considered in this court because no instruction based thereon was given or asked in the trial below, is wholly without merit.

Said paragraph four was a prominent and important part of the contract on which this action is predicated, and the whole contract was at all times before the trial court. Said paragraph speaks for itself. The language is clear and does not call for the giving of a specific instruction, though it is of controlling importance in that it specifies certain conditions to be performed by the defendant precedent to a declaration of forfeiture. Hence the court erred in submitting the question of abandonment and forfeiture to the jury, since those conditions were not performed by the defendant. In other words, said paragraph four conclusively shows that the court erred in giving the instructions excepted to, the giving of which are now urged as grounds for reversal.

Equally without merit is the contention that the method prescribed by paragraph four for the cancellation and forfeiture of the contract for cause, was not required to be followed in this instance, because Alverson had never been permitted to begin work. The argument of opposing counsel proceeds, in the first place, on the erroneous assumption that Alverson refused to proceed with the work, a contention which we absolutely deny, and which is not borne out by the record.

Secondly, even though defendant's contention could by any stretch of construction be held to be good, yet such refusal by Alverson to proceed is

one of the very conditions indicated by paragraph four as calling for the giving of the notice therein prescribed, and the doing of the things therein provided preliminary to cancellation, and as conditions precedent to the employment of "other parties to complete said work or any part thereof."

The wording of said paragraph shows that the parties to the contract appreciated the ever present possibility of differences arising concerning its construction and the measure of the rights and duties of the respective parties thereunder, and with that possibility in view, provided for the giving of a written notice ten days in advance, in order that the contractor might have an opportunity to reflect and reconsider before determining on a definite course of action. The wording of this provision of the contract of itself, and without the aid of the general rule of law that a breach is not committed by an erroneous construction and a claim of more than the contract gives, prevents a declaration of forfeiture in advance of the time for performance by the giving of a ten-day notice that the work must proceed in accordance with the demands of the railroad company. In other words, said paragraph four establishes as clearly as can be expressed by the English language that the railroad company could in no event declare a forfeiture until an opportunity for performance had been extended to the contractor.

IV.

The central allegation of the complaint, consistently maintained through the reply, is that the defendant refused to permit the plaintiff to perform his contract after having recognized the rights of the plaintiff and after having repeatedly promised to permit him to do the work when the time for performance should arrive. Notwithstanding this, a detached statement from the reply is quoted on page 3 of the opposing brief with the contention that the plaintiff thereby admitted that he had refused to perform his contract though offered an opportunity so to do. The excerpt quoted is taken from the reply to paragraph seven of the third affirmative defense and only needs to be read in connection with the remainder of the paragraph and the entire allegation to which it refers to show the absurdity of defendant's contention. The obvious meaning of the language quoted, when considered in connection with the remainder of the paragraph from which it is taken and the allegation to which it refers, is that the railroad recognized the privity of contract existing between it and the plaintiff and offered to allow the plaintiff to do the work when defendant might become ready to proceed with its operations.

It must also be borne in mind that the defendant railroad company is not the moving or complaining party in this Court, nor has it made any coun-

ter assignment of errors; hence, it cannot now be heard to make an affirmative attack on the pleadings. This is especially true since the point was in nowise suggested to the lower court.

Defendants would also make it appear that Alverson, by going to Canada in the summer of 1912, evinced a purpose to abandon his contract. In fact, the contention seems to be that Alverson breached his contract by the mere act of going across the international boundary line into Canada, though the defendant had no use for his services at that time. Alverson testified at considerable length, both on direct and cross examination, in regard to his trip to Canada, emphasizing the fact that he remained at all times in close touch with the railroad officials and was ready to return for the purpose of starting the work whenever notified so to do. While the court will, of course, read all the testimony on this point, the gist appears from the following:

“They kept me waiting around for over a year, with my outfit, and I called numerous times, I cannot tell just how many, but every week or so I would inquire about when the work would be ready, and was always told by Mr. Pittman that they were getting ready as fast as possible, and I would be informed in due time, so I could go ahead with the work.
* * * I waited around a number of months, and then I had some work in Canada I could do, so I moved part of my outfit up there, but kept in communication with Mr. Pittman

through my father-in-law, Mr. J. Z. Moore, and was ready to come down and go right to work on the contract, when I was informed that the work was ready. A number of months afterwards, Mr. Pittman was replaced as chief engineer in charge of the work by Mr. Holman, and the company, without consulting me, or making any arrangements with me, let the work be done by contract to Twohy Brothers." (Record 70, 71.)

Mr. Alverson's father-in-law, Judge J. Z. Moore, testified that, representing Alverson, he frequently called at Mr. Pittman's office during Alverson's absence and was always told that Alverson would be given timely notice, and an opportunity to go ahead with the work when the railroad should be ready. Judge Moore testified:

"When Alverson went to Canada to do some work there, he instructed me to confer frequently with Mr. Pittman, the chief engineer of the defendant, as to when the work, which is the subject matter of this controversy, would be ready to be performed by Alverson under his contract, and that immediately upon receiving notice, he would come down and go ahead with the contract. In pursuance with said request on the part of Alverson, I called frequently at the offices of the company and conferred with Mr. Pittman, the chief engineer, Mr. Pittman informed me at all times that Alverson was to go ahead with the work when they were ready; that he could not tell just when the work would be ready, but that he would let me know, so I could inform Alverson. I made these visits to Mr. Pittman and

conferred with him every few days during all of the time Alverson was in Canada.” (Record 84,85.)

The statement on page 20 of appellant’s brief to the effect that Alverson, on the witness stand, boasted of his conduct (the conduct which defendants claimed constituted a breach), is entirely unjustified. A perusal of Alverson’s testimony will show that he made a calm, frank and full statement of his relations with Mr. Pittman and Mr. Holman, the railroad representatives, and related briefly, in response to the interrogations of the attorneys, his interpretation of the contract and his rights thereunder. A witness in court is expected to narrate facts, but he is not called upon to make a confession of mistaken judgment or to enter a plea for forgiveness as defendant seems to contend.

The undisputed testimony of Alverson and witness Moore, who testified on his behalf, shows that the railroad officials did not consider that Alverson had abandoned his contract, since they continued to assure that he would be given an opportunity to perform long after the discussions concerning sand and gravel and right up to the time the work was finally let to other parties. The fact that notice of cancellation was not given as required by paragraph four of the contract of itself makes it clear that the defendant did not consider

that plaintiff had abandoned or given ground for cancellation of the agreement.

Lack of time forbids analysis and discussion of defendant's authorities, and, since the conclusions of the Court will be based in any event on its own investigation of the law, we must content ourselves with the confident assertion that, on consideration, the citations in our opening brief will be found to fully support and establish the correctness of the contentions there advanced.

Respectfully submitted,

PLUMMER & LAVIN, *and*
O. C. MOORE,

Attorneys for Plaintiff in Error.

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No. 2703

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

J. L. ALVERSON,
Plaintiff in Error,

vs.

OREGON-WASHINGTON RAIL-
ROAD & NAVIGATION COM-
PANY, a corporation,
Defendant in Error.

PETITION FOR REHEARING.

*Upon Writ of Error to the District Court of the
United States, Eastern District of Wash-
ington, Northern Division*

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The opinion herein refusing to consider the exceptions to the charge of the trial judge because not taken in open court before the jury had retired, omits to refer in any way to Rule 58 promulgated by the Appellate Court for the Ninth Circuit, and adopted as a rule of practice by the trial court, specifically providing for the taking of exceptions

after the jury has retired to consider of its verdict.

This rule is set out in *haec verba* on page 4 of the reply brief, and the omission of the court to discuss or even refer to our contention that the exceptions were taken in accordance with and entitled to be considered under this rule, leads us to fear that through mistake or oversight the reply brief, where this point was necessarily first presented, failed to reach the hands of the court. We feel justified, therefore, in filing this petition for a rehearing, again inviting attention to Rule 58 of the trial court as found in the Revised Rules of the U. S. Circuit Court and U. S. District Court for the District of Washington, p. 49.

Said rule is as follows:

“Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the court, after the jury have retired to consider of their verdict, and if practicable before the verdict has been returned, that such party excepts to the same, specifying by numbers of paragraphs or in any other convenient manner the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to; whereupon the Judge shall note such exceptions in the minutes of the trial or cause the reporter

(if one is in attendance) so to note the same.”

As shown in our reply brief, the above rule was promulgated as a rule of practice in this jurisdiction in 1904 by the three judges of the Circuit Court of Appeals, and was thereafter adopted as a rule of practice in the District Court of Washington in the following language found on p. 81 of the printed rules now in use in this district as follows:

“The Rules of the Circuit Court in and for the District of Washington, shall be the rules of practice governing the transaction of business in this Court; the admission of attorneys to practice; the conduct of the officers of the Court; the proceedings in actions at law, suits in equity and criminal prosecutions, and all other matters not otherwise provided for.”

Numerous authorities are also cited in the reply brief from this and other Appellate and Federal Courts to the effect that rules of court regularly promulgated and adopted have and are to be given the force and effect of law. Attention is also there called to the fact that the practice of requiring exceptions to be taken while the jury is at the bar is not in pursuance of any Federal Statute or rule of the Supreme Court, but has simply become recognized and been followed in this country in pursuance of the Statute of Westminster 2, which, of

course, is not controlling except in so far as the courts of this country may see fit to follow it when not in actual conflict with their own established rules of procedure.

We respectfully suggest that the lawyers of the State of Washington, practicing in the Federal Courts where Rule 58 above quoted is still outstanding as one of the rules of practice in the Federal Courts of said State and District, are entitled to have this question squarely settled by distinct reference to the rule in question in order that if said rule is not to be followed or considered as controlling they may be so advised by definite statement of this Appellate Court, referring specifically to and announcing that it is not of any valid force or effect.

We, therefore, believe that this court will recognize the propriety of our request for a re-consideration of the case on this one point and justify us in the presentation of this petition for a re-hearing.

Respectfully submitted,

PLUMMER & LAVIN, *and*

O. C. MOORE,

Attorneys for Plaintiff in Error.

STATE OF WASHINGTON, }
 County of Spokane, } ss.

We, W. H. Plummer, Joseph Lavin and O. C. Moore, separately hereby certify: That I am of counsel for the plaintiff in error, and in my judgment the above and foregoing petition for a rehearing is well founded in law, and that it is not interposed for the purpose of delay.

W. H. PLUMMER.
 JOSEPH LAVIN,
 O. C. MOORE.

